

on July 8, 2008. Board Member Julie Sample has recused herself from this matter. E. L. Lee Kinch was appointed as Board Member Pro Tem.

ISSUES

1. Is claimant entitled to a review and modification of the Agreed Award dated January 21, 2003? Claimant alleges the Agreed Award was entered into without claimant's knowledge or permission and was entered into fraudulently and is subject to modification. Respondent Trimodal argues the Agreed Award was signed by claimant's then attorney and is enforceable.
2. Should respondent Trimodal be bound by the acts and representations of its alleged counsel Stubbs? Claimant alleges respondent Trimodal should be estopped from denying that claimant was its employee, as Attorney Clifford Stubbs filed both an E-1, Application for Hearing, and the Agreed Award with the Kansas Division of Workers Compensation (Division) attesting to the fact claimant was an employee of Trimodal. Respondent Trimodal denies Attorney Stubbs was its attorney and argues that he had no authority to bind it to any legal position.
3. Did the ALJ err in refusing to allow claimant to depose Attorney Stubbs? Claimant argues this deposition is necessary in order to ascertain the proper parties and insurance companies.
4. Did the ALJ err in refusing to order sanctions against Attorney Stubbs?
5. Is claimant's attorney entitled to post-award attorney fees under K.S.A. 44-536?

FINDINGS OF FACT

This is a routine workers compensation injury made incredibly complicated by the actions of more than one attorney. A detailed chronology of the events in this matter is contained in the August 7, 2006 Final Order of the Kansas Department Of Labor (KDOL), in Case No. FA 03-0042-27, In the Matter of Rajwinder Singh Walia.² A full recitation of those events is not necessary in this Order. Only the matters germane to this Order will be discussed herein.

² Review & Modification Hearing (July 12, 2007), Cl. Ex. 1.

Claimant was a self-employed truck driver, driving for Trimodal. The KDOL Final Order states claimant had leased his truck to Trimodal.³ On December 11, 2000, claimant was involved in a motor vehicle accident when he wrecked his truck. Claimant suffered serious injuries and was transported to the Newton Medical Center emergency room and then transferred to Via Christi Regional Medical Center in Wichita, Kansas. As a result of claimant's agreement with Trimodal, claimant had obtained workers compensation insurance through APTDA. This insurance, procured through Fire and Casualty and administered by Ward North, began paying workers compensation benefits to claimant, including both medical treatment and temporary disability benefits. Claimant was diagnosed with a compression fracture at L4. He was determined to be unable to work by his primary physician, Anil Gosalia, M.D. Claimant was later referred to several other health care professionals for treatment. At some point, it was determined that claimant was receiving workers compensation disability benefits while working at a business, Mr. Goodcents, of which he soon became a part owner.

On May 24, 2002, a discovery deposition taken of claimant was conducted by Attorney Stubbs for Ward North. The deposition was held at the law offices of claimant's then attorneys, Schmid & Roswold, P.C. Claimant's attorney, Mark R. Schmid, was present. There is no indication in this record that James M. Roswold was ever authorized to act as attorney for claimant or to assist in the representation of claimant in this matter.

On October 14, 2002, Attorney Stubbs signed and filed an Application for Hearing (E-1) with the Division. The Application lists Trimodal as the respondent and Ward North as the insurance company. Claimant did not sign the E-1. Attorney Stubbs is listed as the attorney for the applicant.

On November 26, 2002, a "Dismissal of Claim" without prejudice was signed by claimant, with his signature being notarized. The attorney signature is illegible, but the names of both Attorney Roswold and Attorney Schmid are listed below the signature with Attorney Roswold's Kansas Supreme Court bar number. No such number appears behind Attorney Schmid's name. The name listed below the Certificate of Service lists Attorney Schmid's name only and bears the same illegible signature as described above. There is no other signature contained on this Dismissal of Claim.

On December 23, 2002, a letter from Attorney Stubbs to Attorney Schmid stated that the Dismissal of Claim was ineffective in Kansas and an Agreed Award had been prepared for Schmid to review, sign and return. This Agreed Award was signed by Stubbs and with the same illegible signature, above the names of Roswold and Schmid, as was on the Dismissal of Claim. The Agreed Award was also signed by ALJ Julie Sample, but was not signed by claimant. This Agreed Award lists Trimodal as the respondent and Ward North as the insurance company. It also states claimant was injured on

³ Review & Modification Hearing (July 12, 2007) at 35.

December 11, 2000, and that the relationship of employer and employee existed on the date of accident. The Agreed Award goes on to list the amount of TTD and medical benefits paid in this matter and states that "claimant acknowledges that he was not entitled to the benefits paid to him pursuant to his alleged injury." It further states that the parties acknowledge and stipulate that claimant is not entitled to any additional benefits pursuant to this claim. Respondent and its insurance carrier agreed, in the Agreed Award, to not seek direct reimbursement from claimant for the benefits paid. The Agreed Award indicates claimant was present, but there is no indication in this record that claimant actually participated in any such hearing.

Attorney Stubbs used the Agreed Award to obtain reimbursement from the Kansas Workers Compensation Fund (Fund) for the moneys expended for claimant's TTD and medical benefits. These funds included \$20,941.49 in TTD and lost time benefits and \$15,331.46 in medical payments. The total reimbursement was \$36,272.95. This reimbursement was sent to Attorney Stubbs, payable to Trimodal. However, the funds were then forwarded to Ward North, the entity that actually paid said sums.

Both Trimodal and Ward North agreed to forego reimbursement from claimant for the money paid on claimant's behalf. However, no such promise came from the Fund, which was out a substantial sum, allegedly due to claimant's misrepresentations. A Fraud and Abuse claim was filed against claimant for the sums expended. During the Fraud and Abuse hearing, claimant testified that he had never seen the Agreed Award, never discussed the agreement with Attorney Schmid, his attorney, never authorized Attorney Schmid to sign the Agreed Award on claimant's behalf and never even met Attorney Roswold. The initial Fraud and Abuse determination found claimant liable for fines and penalties in the amount of \$46,000.00. An appeal followed which resulted in the fines and penalties award being overturned. The Final Order, issued by the KDOL on August 7, 2006, found neither Attorney Schmid nor Attorney Roswold had the authority to bind claimant with the Agreed Award without claimant's knowledge and permission. Thus, the representations contained in the Agreed Award were not binding on claimant.

On April 6, 2007, claimant filed and served a Motion for Review and Modification of the Agreed Award. A February 6, 2008 Review & Modification Order issued by the ALJ determined that the Agreed Award was made without claimant's authority, knowledge or consent and a consideration of a review and modification of the Agreed Award was, thus, proper. The ALJ, in his Review & Modification Award of April 14, 2008, denied claimant any modification of the Agreed Award. The ALJ determined that claimant had never been an employee of Trimodal and, therefore, could not be awarded benefits from Trimodal. Claimant's request for post-award medical treatment and payment of unauthorized medical expenses was also denied. The ALJ did award attorney fees to claimant's attorney in the amount of \$2,962.50 representing 19.75 hours at \$150.00 per hour. No hearing on the issue of attorney fees is found in this record.

Claimant's attorney has requested the opportunity to depose Attorney Stubbs in order to ascertain the proper respondents and insurance companies in this matter. However, in response to a request by the Board at oral argument, Attorney Stubbs provided a letter dated July 8, 2008, with a designation of the proper respondent that Attorney Stubbs represents in this litigation and its insurance company and administrator. Attorney Stubbs clarified that APTDA's workers compensation insurance was written by Fire and Casualty and administered by Ward North, which is now doing business as NovaPro Risk Solutions. This letter, which was copied to the attorney for claimant and Trimodal, has not been objected to. It helps clarify this record's original respondent/insurance company confusion.

PRINCIPLES OF LAW AND ANALYSIS

First, the Board must determine the identities and relationships of the various parties to this litigation. The initial filing of the E-1 and the Agreed Award indicate Attorney Stubbs is the legal representative of Trimodal. However, Trimodal's current attorney has represented to the Board that Attorney Stubbs has never represented Trimodal in this litigation. This legal relationship is significant as claimant contends the representations by Attorney Stubbs in the E-1 and the Agreed Award should act to estop Trimodal from denying that claimant was an employee of Trimodal. Trimodal argues that Attorney Stubbs had no authority to bind it by any legal representations, having never been given authority to do so by Trimodal.

The true identity of the parties and their legal relationship should depend on the evidence and information contained in this record. The Board is authorized to conform the pleadings to the evidence.⁴ Moreover, the Board is not bound by technical rules of procedure as long as the parties are given a reasonable opportunity to be heard and present evidence.⁵ Due to the confusion in this record, and the estoppel claims of the claimant, the Board requested from the parties, at oral argument, clarification of the respondents and their insurance companies and legal representatives. The announcements at the oral argument to the Board paired Trimodal with Pacific Employers and APTDA with Ward North. The July 8, 2008 letter from Attorney Stubbs clarified that Ward North was the administrator for Fire and Casualty, the actual insurance company for APTDA. The pleadings have been modified accordingly.

Claimant has consistently testified in this matter that he was a self-employed truck driver, driving for Trimodal. While claimant's attorney alleges that claimant was an employee of Trimodal, no evidence of that alleged relationship exists in this record except

⁴ *Trautloff v. Atchison Products, Inc.*, No. 267,998, 2004 WL 3089859 (Kan. WCAB Nov. 18, 2004); *Tedder v. Phil Blocker, Inc.*, Nos. 264,296 and 264,297, 2002 WL 598489 (Kan. WCAB March 29, 2002).

⁵ *Shehane v. Station Casino*, 27 Kan. App. 257, 3 P.3d 551 (2000).

for the filings of Attorney Stubbs. Claimant's testimony has been consistent throughout and is found to be sufficiently persuasive to convince the Board of its accuracy. Thus, claimant is found to have been self employed, with his own workers compensation insurance carrier, Fire and Casualty, obtained through APTDA, and with Ward North as the administrator of that policy. That fact becomes significant when considering that Attorney Stubbs identified Ward North as the original insurance carrier when filing the E-1, and Ward North voluntarily began paying workers compensation benefits to claimant after the accident.

Additionally, claimant has testified that he procured workers compensation insurance through APTDA. This insurance, according to the letter from Attorney Stubbs, is through Fire and Casualty and is administered by Ward North. When claimant first began receiving benefits, the payments were through Ward North.

K.S.A. 44-503c(a)(1) states:

(a) (1) Any individual who is an owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be considered to be a contractor or an employee of the licensed motor carrier within the meaning of K.S.A. 44-503, and amendments thereto, or an employee of the licensed motor carrier within the meaning of subsection (b) of K.S.A. 44-508, and amendments thereto, and the licensed motor carrier shall not be considered to be a principal within the meaning of K.S.A. 44-503, and amendments thereto, or an employer of the owner-operator within the meaning of subsection (a) of K.S.A. 44-508, and amendments thereto, if the owner-operator is covered by an occupational accident insurance policy and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. § 3101 *et seq.*, the federal social security act, 42 U.S.C. § 301 *et seq.*, the federal unemployment tax act, 26 U.S.C. § 3301 *et seq.*, and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. § 3401 *et seq.*

Claimant has testified to working for Trimodal as an independent truck driver. The Final Order of the KDOL stated that claimant was a self-employed, over-the-road trucker, a description the Board accepts. The Final Order went on to note that claimant leased his truck to Trimodal. The Board finds that claimant drove for Trimodal as an independent truck driver and was required to provide his own workers compensation insurance, which he did through APTDA and Fire and Casualty and with Ward North as the administrator. Therefore, the appropriate entities for claimant to pursue after the accident on December 11, 2000, would be claimant or a self-employed person and his insurance company, Fire and Casualty, with Ward North as the administrator. This was accomplished by claimant early on, with Ward North paying for both temporary disability and medical treatment. There is nothing in this record to support a finding that claimant did not suffer the injuries for which he was provided benefits. There is also nothing in this record to support a finding that claimant was not driving as an independent truck driver for

Trimodal on the date of accident. Finally, the Board finds claimant was and is entitled to workers compensation benefits for the injuries suffered from the accident of December 11, 2000, while driving a self-employed trucker and that Fire and Casualty, with Ward North as the administrator, is responsible for the payment of those benefits.

Kansas has applied the doctrine of equitable estoppel in workers' compensation proceedings.⁶ In *Marley*, the Kansas Court of Appeals held a claimant to the terms of his written agreement with respondent by finding claimant was estopped from denying he was an independent contractor.

The doctrine of equitable estoppel requires consistency of conduct, and a litigant is estopped and precluded from maintaining an attitude with reference to a transaction wholly inconsistent with his or her previous acts and business connections with such transaction.⁷

However, "one who asserts an estoppel must show some change in position in reliance on the adversary's misleading statement. . . ."⁸

A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts⁹

Claimant asserts that Trimodal is estopped from denying that an employer/employee relationship existed between claimant and Trimodal on the date of accident. The ALJ rejected this assertion, and the Board agrees. This record does not support a finding that claimant worked for Trimodal or that Trimodal made any such admission. No attorney actually representing Trimodal made any such representations. Trimodal is not bound by the representations of attorney Stubbs.

APTDA, Fire and Casualty and Ward North were aware that claimant was involved in the accident on December 11, 2000, while employed by Walia Trucking and driving for Trimodal, and suffered a need for workers compensation benefits as a result. Benefits were paid and treatment was provided under the contract created through APTDA

⁶ *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421 (2000).

⁷ *Marley* at Syl. ¶ 1.

⁸ *In re Morgan*, 219 Kan. 136, 546 P.2d 1394 (1976).

⁹ *United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 527, 561 P.2d 792 (1977).

between claimant, Walia Trucking as the employer, Fire and Casualty as the insurance company, and Ward North as the administrator.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹⁰

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹¹

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.¹²

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."¹³

This record supports a finding that claimant suffered an accidental injury while self-employed doing business as Walia Trucking. Therefore his injury arose out of and in the course of his employment with Walia Trucking. Claimant had obtained workers compensation insurance through APTDA with Fire and Casualty, with Ward North as the administrator.

¹⁰ K.S.A. 44-501 and K.S.A. 44-508(g).

¹¹ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹² K.S.A. 44-501(a).

¹³ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

K.S.A. 44-521 states:

Compensation due under this act may be settled by agreement; subject to the provisions contained in K.S.A. 44-527.

K.S.A. 44-527 states:

At the time of making any final payment of compensation, the employer shall be entitled to a final receipt for compensation, executed and acknowledged or verified by the worker, which final receipt may be in form a release of liability under this act, and every such final receipt for compensation or release of liability or a copy thereof shall be filed by the employer in the office of the director within 60 days after the date of execution of such final receipt or release of liability, and if the employer shall fail or neglect to so file such final receipt or release of liability, the same shall be void as against the worker.

The director shall accept, receipt for, and file every agreement, finding, award, agreement modifying an award, final receipt for compensation or release of liability or copy thereof, and record and index same, and every such agreement, finding, award, agreement modifying an award, final receipt or release, shall be considered as approved by the director and shall stand as approved unless said director shall, within 20 days of the date of the receipt thereof, disapprove same in writing and notify each of the parties of his disapproval, giving his reasons therefor, sending a copy of the same to each of the parties by certified mail, return receipt requested. No proceedings shall be instituted by either party to set aside any such agreement, release of liability, final receipt for compensation or agreement modifying an award, unless such proceedings are commenced within one year after the date any such agreement, release of liability, final receipt for compensation or agreement modifying an award has been so filed and approved by the director.

K.A.R. 51-3-1 states in part:

Compensable cases shall be determined and terminated only by five procedures under the act:

- (a) By filing a final receipt and release of liability pursuant to K.S.A. 44-527 and amendments thereto;
- (b) by hearing and written award;
- (c) by joint petition and stipulation subject to K.A.R. 51-3-16;
- (d) by settlement hearing before an administrative law judge; or
- (e) by voluntary dismissal by the parties.

The parties attempted to dismiss this matter through the creation of a "Dismissal of Claim" which was signed by claimant and a person alleging to be claimant's attorney. However, a dismissal must be "by the parties".¹⁴ The "Dismissal of Claim" was not signed

¹⁴ K.A.R. 51-3-1(e).

by all parties and there is nothing in this record to support a finding that it was agreed to by any alleged employer of claimant or any legal representative of any alleged employer of claimant. Therefore, the "Dismissal of Claim" is not effective and is a nullity. The parties also attempted to resolve this matter with the "Agreed Award" which was created without claimant's knowledge or permission and was, perhaps, even signed by an attorney who did not have the right to represent claimant in this litigation. Thus, the Agreed Award does not meet the procedural requirements of K.S.A.44-521, K.S.A. 44-527 or K.A.R. 51-3-1.

The ALJ determined that the Agreed Award was subject to review and modification and the Board agrees. However, the party or parties against whom this review and modification is effective were not properly determined by the ALJ. The liability of Walia Trucking, with Fire and Casualty as its insurance carrier and Ward North as the administrator, has yet to be determined.

K.S.A. 44-555c(a) states:

(a) There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge. The board shall be within the division of workers compensation of the department of human resources and all budgeting, personnel, purchasing and related management functions of the board shall be administered under the supervision and direction of the secretary of human resources. The board shall consist of five members who shall be appointed by the secretary in accordance with this section and who shall each serve for a term of four years, except as provided for the first members appointed to the board under subsection (f).

K.S.A. 2007 Supp. 44-551(i)(1) states:

(i) (1) Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation. Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the

administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

The Board does not have original jurisdiction in workers compensation litigation. The Board was created to act as a reviewing body over the decisions of workers compensation administrative law judges. Thus, the Board is limited in its powers. Any questions presented to the Board should have been determined by an administrative law judge. Here, no determination regarding the liability of Walia Trucking and its insurance company or any defenses they may raise has been reached by an administrative law judge. The Board remands this matter to the ALJ for a determination as to claimant's entitlement to a review and modification of the Agreed Award. Should the ALJ determine it necessary, an IME may be ordered to determine claimant's current medical status and need for future treatment as it relates to the original injury from December 11, 2000.

The Kansas Workers Compensation Act permits a claimant to request post-award medical benefits¹⁵ and authorizes an award of attorney fees in connection with that request.¹⁶

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis.¹⁷

There is no indication in this record that a hearing pursuant to K.S.A. 44-536 was held to determine claimant's entitlement to post-award attorney fees. This matter is remanded for a hearing to determine the appropriate entitlement to and amount of attorney fees pursuant to K.S.A. 44-536. Claimant's request to depose Attorney Stubbs in this matter is denied.

¹⁵ K.S.A. 44-510k(a).

¹⁶ K.S.A. 44-510k(c) and K.S.A. 44-536(g).

¹⁷ K.S.A. 44-536(g).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Review & Modification Award of the ALJ should be reversed and this matter remanded to the ALJ for a determination as to the liability of Rajwinder Singh Walia Trucking and its insurance carrier, Fire and Casualty Insurance Company of Connecticut, and its administrator Ward North America, Inc., for the injuries suffered by claimant on December 11, 2000. The matter is also remanded for a hearing to determine the appropriateness of and amount of attorney fees due claimant's attorney pursuant to K.S.A. 44-536. Claimant's request to depose Attorney Stubbs in this matter is denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review & Modification Award of Administrative Law Judge Kenneth J. Hursh dated April 14, 2008, should be, and is hereby, reversed and the matter remanded to the ALJ pursuant to the above instructions.

IT IS SO ORDERED.

Dated this ____ day of September, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Frank D. Taff, Attorney for Claimant
- Clifford K. Stubbs, Attorney for Respondent APTDA and its Insurance Carrier, Fire and Casualty, and its administrator, Ward North
- Wade A. Dorothy, Attorney for Respondent Trimodal, Inc., and its Insurance Carrier Pacific Employers
- Kenneth J. Hursh, Administrative Law Judge