



Claimant contends that the evidence substantiates his allegation that he was an employee of respondent when he was injured and that he provided timely notice of his injury. Thus, the ALJ's preliminary hearing Order should be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant and Jeremy Baker, owner of Advanced Concepts (respondent) met in June or July of 2003. Claimant apparently has some sort of roofing experience and respondent provides construction services, including the installation and repair of roofs. The two met while working on a construction job for the Plaza Hotel. Claimant was, in some instances, a competitor to respondent.

Later on in 2003 claimant left for Texas to work for another company although claimant and Mr. Baker remained in sporadic telephone contact. In May 2004, the two talked and claimant ultimately moved back to Kansas to help Mr. Baker get his business "fired up".<sup>1</sup> Whether Mr. Baker initiated this call or it was done by claimant is disputed.

Claimant arrived in Kansas and Mr. Baker opened up his home to him. Immediately thereafter, claimant says he began working for respondent. He did not fill out any tax paperwork or do anything else with respect to his employment status. According to claimant, he merely began working on various jobs for respondent and would periodically receive cash from Mr. Baker.

Claimant says he received advances from respondent and when the roofing project was completed, he would get paid based upon the number of squares he installed on a roof. By the time a third job came along Mr. Baker made claimant a foreman and placed him in charge of supervising the other workers. Nonetheless, claimant testified that "[h]e [Baker] was the one that assigned who went to what job and who got what materials and stuff like that".<sup>2</sup> At this point there was an agreement that claimant would be paid \$15 a square for roofing and supervising. He would also get a percentage of what was earned for the job as a bonus for helping to get the work. Unfortunately, no ledger of this money was produced.

Claimant contends that he worked for respondent for roughly two years as a foreman and sales rep and earned anywhere from \$1000 to \$2000 a week. He produced a business card that reflects his purported status as a sales rep for respondent. Mr. Baker

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<sup>1</sup> P.H. Trans. (May 12, 2005) at 71.

<sup>2</sup> *Id.* at 61.

confirmed that he provided a car and a cell phone for claimant to use, although he couches this in terms of a gratuitous gesture rather than one necessary to his business pursuits.

On July 21, 2005, claimant was working on a roofing job for respondent when it started to rain. At that time claimant proceeded to climb off of the roof by way of a ladder. When claimant reached the bottom of the ladder he testified he stepped on a two-by-four that had a nail in it and his right foot came down on the nail. According to claimant, his co-workers had to pry his foot off of the nail, although none of them testified. Claimant maintains he informed Mr. Baker of this incident, and that Mr. Baker told him not to worry about it if he had a tetanus shot. Claimant therefore did not seek medical care until July 29th, by this time his foot had become infected.

Claimant sought treatment from a local clinic who referred him to an emergency room. Claimant believes the visit to the clinic was authorized by Mr. Baker, who denies this. Claimant was ultimately hospitalized for the infection in his foot and was followed by some outpatient treatment. His treatment was complicated by the fact that he has been diagnosed with prostate cancer.

Mr. Baker acknowledged that claimant worked for his company as a subcontractor on some jobs and even bid against his company on a job. However, Mr. Baker maintains that claimant was not his company's salesman and that he did not know where he was most times. Rather, claimant provided help to his company on a sporadic basis as a kind gesture in exchange for providing him room and board.

Mr. Baker testified that he never paid claimant any money for his services to respondent. He indicated that he gave claimant money to pay the people that helped the claimant on those jobs, but that claimant would not accept money for himself since Mr. Baker was giving him a place to live, food and transportation.<sup>3</sup> And despite the fact that claimant helped to solicit work for respondent, he was not paid any sort of signing bonus.

Mr. Baker testified that the first time claimant informed him of any problems with his foot was when he first met claimant. He testified that claimant told him "that his mother had ran over his foot as - - when he was a child and he had a fake foot."<sup>4</sup> He indicated the next time claimant mentioned his foot was when claimant claimed to have been bitten by a spider while sleeping on his couch. He testified that he told claimant that spider bites were nothing to mess with and that he should have it looked at. Five weeks after the spider bite ordeal, Mr. Baker stated that he and claimant had a conversation at a work site about claimant injuring his foot by stepping on a nail and that he told claimant that he might want to go have it looked at. Mr. Baker testified that claimant told him "[h]e said, I've had

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<sup>3</sup> *Id.* at 79-80.

<sup>4</sup> *Id.* at 81.

a tetanus shot within the last five years, and he said, it ain't killing me, I'm not going to see no doctor."<sup>5</sup>

Mr. Baker did not consider claimant an employee and never had claimant fill out any tax paperwork or treat him as such. He indicated that he did not actually have any employees, but that he simply had people who would follow him from job to job as independent contractors and he would pay them from job to job.

It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.<sup>6</sup>

There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>7</sup> The relationship of the parties depends upon all the facts, and the label that 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.<sup>8</sup>

The test primarily used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is 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.<sup>9</sup>

In addition to the right to control and the right to discharge the worker, 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.

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<sup>5</sup> *Id.* at 82-83.

<sup>6</sup> *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

<sup>7</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

<sup>8</sup> *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

<sup>9</sup> *Wallis*, 236 Kan. 97, 102-103.

- (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.<sup>10</sup>

The ALJ concluded claimant was an employee of respondent. The Board has considered the evidence and agrees with the ALJ's conclusion. Mr. Baker's recitation of the events is, based upon the facts so far developed, inherently implausible. The Board affirms the ALJ's conclusion that claimant was employed by respondent on the date of his accident.

The Board likewise affirms the ALJ's conclusion that claimant was injured on July 21, 2004, and that he provided notice of this injury. Even Mr. Baker admits claimant told him of this event shortly thereafter and that he believed claimant's contention. Mr. Baker simply now chooses to believe that claimant was bitten by a spider before this incident and that the bite is the cause of his ongoing physical complaints. None of the physicians who have seen claimant have come to this conclusion, nor do any of the medical reports ever mention such an event.

The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In granting claimant's request for TTD benefits, the ALJ apparently believed his testimony over Mr. Baker's testimony. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. The ALJ found claimant to be credible on this issue and the Board finds no reason to disturb his findings on either of these issues.

As for the final issue of TTD, the Board has no jurisdiction to consider this matter. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

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<sup>10</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.<sup>11</sup> The ALJ has the authority to grant or deny requests for TTD benefits following a preliminary hearing and the Board has no jurisdiction to review that determination. Accordingly, respondent's appeal on the issue of TTD is dismissed.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated August 10, 2005, is affirmed, and the appeal on the issue of TTD is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2005.

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BOARD MEMBER

c: Stanley E. Oyler, Attorney for Claimant  
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>11</sup> See K.S.A. 44-551(b)(2)(A).