

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LARRY D. BUTTERFIELD, SR.)	
Claimant)	
VS.)	
)	Docket No. 1,021,808
L & K CONSTRUCTION)	
Respondent)	
AND)	
)	
NATIONWIDE MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the July 22, 2005, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

On February 5, 2004, claimant slipped on ice and fell while cleaning his neighbor's driveway. Claimant, who is a co-owner of respondent, contends the accident arose out of and in the course of employment with respondent. In this regard, claimant argues respondent clears the snow from the neighbor's driveway and performs any trenching work on the neighbor's property in exchange for the neighbor mowing part of claimant's lawn and part of the acreage where respondent's building is located.

In the July 22, 2005, Order, Judge Moore ruled that claimant had failed to prove his accident arose out of his employment with his company as the company did not regularly clear driveways as a part of its business activities.

Claimant contends Judge Moore erred. Claimant argues an implied agreement existed that required claimant, among other things, to clean his neighbor's driveway and in exchange his neighbor would mow around respondent's building. Accordingly, claimant argues he has established a connection between the work he was performing at the time of his accident and his employment.

On the other hand, the insurance carrier argues the July 22, 2005, Order should be affirmed. The insurance carrier argues that clearing snow was not a regular business

activity of the respondent corporation and, therefore, claimant's accident could not arise out of and in the course of his employment. Finally, the insurance carrier argues claimant was merely being neighborly by cleaning snow from his neighbor's driveway for the last 18 years.

The only issue before the Board on this appeal is whether claimant's accident arose out of and in the course of his employment with respondent.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the Board finds:

1. Claimant and his wife own the respondent corporation. The corporation primarily digs trenches and installs water lines for two rural water districts. Claimant is respondent's sole employee.
2. On February 5, 2004, claimant slipped on ice and fell while clearing snow from a neighbor's driveway. Respondent's insurance carrier does not dispute the accident occurred. But the insurance carrier does challenge whether the accident arose out of and in the course of claimant's employment with respondent.
3. Claimant's neighbor, Michael Meier, regularly mows without charge over one-half acre of claimant's four and one-half acre lawn and over one-half acre of the three acres of land where respondent's building is located. Respondent's building is approximately one-quarter mile from Mr. Meier's property. During the growing season, Mr. Meier mows at least weekly. Claimant, on the other hand, provides Mr. Meier without charge trenching and backhoe services and clears his driveway of snow. But there is not a written document that memorializes this arrangement, which appears to have been followed for some 18 years.

CONCLUSIONS OF LAW

The deciding issue is not whether claimant or the respondent corporation received a fee for cleaning Mr. Meier's driveway. Nor is the critical issue whether respondent regularly performed snow removal services for hire. Likewise, the issue is not whether a contract, expressed or implied, existed between claimant or his company and Mr. Meier. Instead, the decisive issue is whether the work claimant was performing at the time of the accident was somehow related to his company. And as a co-owner and president of the respondent corporation, the choice of work claimant could assign himself to perform on behalf of his corporation was unfettered.

Claimant's testimony is neither so incredible nor so unreasonable as to exclude it from consideration. In a July 14, 2004, recorded statement to the insurance carrier, claimant indicated he was hired to clean his neighbor's drive. At his May 2005 deposition, claimant further explained that he and his neighbor did not charge for the work they did for each other as they traded services. There is no question the mowing Mr. Meier performed around respondent's building as part of their 18-year-old arrangement directly benefitted the corporation.

Claimant's testimony establishes that he cleared Mr. Meier's driveway as part of their arrangement and that Mr. Meier, in exchange, would mow around respondent's building. There is no testimony that directly contradicts claimant's assertions. Based upon the 18-year-old arrangement, claimant could reasonably expect that clearing his neighbor's drive would continue the weekly mowing of his company's property. Accordingly, clearing Mr. Meier's driveway directly benefitted the respondent corporation, which establishes a link between claimant's accident and the respondent corporation. Because of that connection between the work claimant was performing at the time of his accident and his corporation, the February 5, 2004, accident arose out of and in the course of his employment with his company. Consequently, this claim should be remanded for the Judge to address any remaining issues.

As a practical matter, when an injured worker is also the owner or president of the employer, the insurance carrier is placed at a disadvantage in attempting to challenge the owner's allegations that he or she was working for his or her company at the time of an accident. Nonetheless, the burden of proof is not changed. In short, these worker/owners must prove that it is more probably true than not that they sustained personal injury by accident arising out of and in the course of their employment – no more, no less.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.¹

WHEREFORE, the Board reverses the July 22, 2005, preliminary hearing Order and remands this claim to the Judge to address any remaining issues regarding claimant's request for benefits.

IT IS SO ORDERED.

¹ K.S.A. 44-534a(a)(2).

Dated this ____ day of September, 2005.

BOARD MEMBER

- c: James B. Biggs, Attorney for Claimant
John F. Carpinelli, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director