BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BEN L. HAMM Claimant	)	
VS.	)	
PINNACLE CONST. GROUP INC. **BM FRAMING CONTRACTORS** **METRO NATIONAL FRAMING** Respondents	)	Docket No. 1,021,838
AND	)	
EMPLOYERS MUTUAL CASUALTY CO. **MOUNTAIN STATES MUTUAL CASUALTY** Insurance Carriers	)	

ORDER

Respondent, Pinnacle Construction Group, Inc., and its insurance carrier, Employers Mutual Casualty Co. request review of the July 8, 2005 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

Respondent, Pinnacle Construction Group, Inc., (Pinnacle) was the general contractor for the construction of a Residence Inn. Pinnacle entered into a subcontract with Metro National Framing (Metro) to perform the framing for the project. Apparently, Metro then subcontracted a portion of that work to B & M Framing Contractors (B & M). It was essentially undisputed the claimant was hired and paid by B & M. In a fall at the work site on February 1, 2005, the claimant injured his left elbow.

Although the Administrative Law Judge (ALJ) found the claimant was hired by B & M she assessed liability for claimant's benefits against Pinnacle.

Pinnacle requests review of the following: (1) whether the ALJ erred in determining a relationship existed between Pinnacle and the claimant; or (2) whether the ALJ erred in finding Pinnacle liable for benefits pursuant to K.S.A. 44-503.

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:

On January 25, 2005, claimant was hired as a framer by Travis Brownlow, B & M, to work on the Residence Inn construction project. Claimant testified he was paid in a check by Mr. Brownlow and also received directions from him. On February 1, 2005, claimant fell from the second floor, hit his elbow on the first floor bracing and then fell to the concrete floor. Claimant fractured and dislocated his left elbow. The claimant received emergency room treatment and was later referred to Dr. George L. Lucas for care and treatment.

Pinnacle was the general contractor for the construction of a Residence Inn in Wichita. Pinnacle contracted with Metro to perform the framing work. As a part of that subcontract agreement, Metro provided proof that it had workers compensation insurance coverage. Mr. Frye[1], president of Pinnacle, testified that he did not know whether Metro had subcontracted part of the framing work to B & M or whether there was an employee/employer relationship between those entities.

In the latter part of January 2005, Metro's workers quit showing up for work on the project because they were not getting paid by Metro. But the crew supplied by B & M continued to work and Pinnacle then paid B & M for the work performed from late January through February 18 when Pinnacle then signed a subcontract with B & M to perform the framing work. Pinnacle later terminated its contract with Metro. Mr. Frye testified:

> Q. Did Pinnacle pay B & M, then, for that work in that two-week period of time?
>
> A. Yes.
>
> Q. So while the agreement [subcontract between Pinnacle and B & M] wasn't signed until the 14th or the 18th, Pinnacle had a relationship, subcontractor relationship with B & M Framing for that two-week period from late January of 2005 through February 14th or February 18th of 2005, true?
>
> A. They were -- we had paid them, yes.
>
> Q. You were paying them for the job of framing.

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[1] At the preliminary hearing, the president of Pinnacle testified and was identified in the transcript as Michael Frye. The exhibits signed by the president of Pinnacle contained a spelling of the surname as Frey.

A. Yes.[2]

Claimant had been told that B & M did not have workers compensation insurance coverage outside the state of Oklahoma. When the subcontract was signed between Pinnacle and B & M, it noted that B & M had secured workers compensation insurance coverage effective February 5, 2005.

The claimant testified regarding a conversation he had with Mr. Brownlow of B & M:

> Q. You've told the Judge about the communications you've had with Mr. Brownlow about workers' compensation coverage at the time you hired on. Did you have discussions with Mr. Brownlow after your injury about workers' compensation coverage?
>
> A. Yeah, once I got hurt, I said, "Okay, so who's taking care of this?" He said, "Well, it's going to fall on the shoulders of either Pinnacle or it's going to fall on the shoulders of" --
>
> Q. Metro National?
>
> A. -- Metro National Framing." He said that one of the two of 'em was going to pick up the bill. I think this is where I learned -- here, in fact, just in recollecting, here is where I learned, he says, "Either Pinnacle is going to pick up the bill or Metro National Framing is going to pick up the bill because we do not have the insurance for out-of-state employees."
>
> Q. This is Brownlow telling you this?
>
> A. Yeah. And he let me know one of the two was carrying workman's compensation for the job.[3]

Pinnacle and Metro signed a contractual agreement on January 13, 2005. Metro was required to provide proof of workers' compensation coverage. This contract was not terminated until March 31, 2005. Mr. Frye testified that B & M provided Pinnacle with proof of coverage through St. Paul Travelers which was effective February 5, 2005.

> Q. Between late January of 2005 and February 5, 2005 when this binder of insurance goes into effect, you knew that B & M Framing was performing work on the project, correct?
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> A. I knew that they were performing work on the project.

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[2] P.H. Trans. at 45-46.

[3] *Id.* at 30-31.

Q. Whose insurance did you believe had coverage at that point?

A. Metro National.

Q. Even though Metro National's crews had pulled off?

A. The insurance -- I have a contract in force with them and I have a Certificate of Insurance from them.[4]

K.S.A. 44-503(a) extends the application of the Workers Compensation Act to certain individuals and entities who are not the immediate employers of an injured worker.[5] The purpose of the statute is to give employees of a sub-contractor a remedy against a principal contractor and to prevent employers from evading liability under the act by contracting with outsiders to do work which they have undertaken as a part of their trade or business.[6] The statute provides:

> Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, **the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal**; . . .[7] (Emphasis added)

There is a two-part test to determine whether the work which caused the injury is part of the principal's trade or business, i.e. (1) is the work being performed by the injured employee necessarily inherent in and an integral part of the principal's trade or business? (2) is the work being performed by the injured employee such as is ordinarily done by employees of the principal? If either of the foregoing questions is answered in the affirmative the work being done is part of the principal's trade or business, and the injured employee is a statutory employee of the principal.[8]

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[4] *Id.* at 48-49.

[5] *Hollingsworth v. Fehrs Equip. Co.*, 240 Kan. 398, 729 P.2d 1214 (1986).

[6] *Bright v. Cargill, Inc.*, 251 Kan. 387, 837 P.2d 348 (1992); *Atwell v. Maxwell Bridge Co.*, 196 Kan. 219, 409 P.2d 994 (1966).

[7] K.S.A. 44-503(a).

[8] *Hanna v. CRA, Inc.*, 196 Kan. 156, 409 P.2d 786 (1966).

Initially, it must be determined whether the work that claimant was performing was inherent in and an integral part of Pinnacle's business. The record establishes that Pinnacle was the general contractor on a project to construct a Residence Inn. As a part of that construction, the building must be framed. That is the work claimant was performing when he was injured. The work claimant was performing was an integral part of construction of the Residence Inn and claimant was a statutory employee of Pinnacle.

However, the fact that claimant qualifies as a statutory employee of Pinnacle is not necessarily determinative of whether Pinnacle is liable for claimant's workers compensation benefits. K.S.A. 44-503(g) states in part:

> . . . the principal shall not be liable for any compensation under this or any other section of the workers compensation act for any person for which the contractor has secured the payment of compensation which the principal would otherwise be liable for under this section and such person shall have no right to file a claim against or otherwise proceed against the principal for compensation under this or any other section of the workers compensation act.

The principal in this case, Pinnacle, cannot be held liable where the contractor has secured payment of compensation for which the principal would otherwise be liable. In this instance, Metro had apparently obtained workers compensation insurance but the record does not establish what business relationship existed between Metro and B & M. Pinnacle argues that B & M had workers compensation insurance coverage through the policy that Metro had provided. Based on the record compiled to date, the Board disagrees.

It is unclear from the record what the relationship was between Metro and B & M. It is clear from the record that B & M's employees, including claimant, continued performing the framing work after Metro's crews quit showing up at the work site. Pinnacle was aware of this development and not only paid B & M for the work performed during the time period claimant was injured but also later entered into the same subcontract for framing work with B & M as it had previously entered with Metro. And the record establishes that B & M did not have workers compensation insurance outside the state of Oklahoma until after claimant's accident.

> . . . **In the event that the payment of compensation is not secured or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation**.[9] (Emphasis added)

Consequently, Pinnacle, the principal in this case, is liable because the contractor, B & M, did not have workers compensation coverage in effect at the time of claimant's work-related accident. The Board affirms the ALJ's Order.

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[9] K.S.A. 1998 Supp. 44-503(g).

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[10]

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 8, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2005.

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BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Ronald J. Laskowski, Attorney for Pinnacle and Employers Mutual
J. Phillip Gragson, Attorney for Metro National and Mountain States
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[10] K.S.A. 44-534a(a)(2).