

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

ROBIN D. HANEY)	
Claimant)	
)	
VS.)	
)	
JEFF CHANEY)	
Uninsured Respondent)	Docket No. 1,027,112
)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

All three parties requested review of the January 23, 2009 Award by Administrative Law Judge Thomas Klein. The Board initially heard oral argument on May 15, 2009, but the parties agreed to a continuance. This matter was then rescheduled and held on July 8, 2009.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Ronald J. Laskowski of Topeka, Kansas, initially appeared for the respondent. But respondent appeared pro se at oral argument before the Board. David J. Bideau of Chanute, Kansas, appeared for the Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

On October 19, 2005, claimant struck his head on the roll cage in the bulldozer he was operating when the machine was jolted by a large rock. The Administrative Law Judge (ALJ) determined claimant was an employee of respondent at the time of the accident for the following reasons: (1) it was incredible to think that claimant would have had his own

key to start respondent's bulldozer; (2) Mr. Jones, who was operating a trackhoe at the job site where claimant was injured, promptly telephoned Mr. Chaney to report the accident; (3) Mr. Chaney immediately returned from Tulsa and gave claimant a ride home from the hospital; and, (4) Mr. Jones (who denied being respondent's foreman, denied claimant was employed by respondent, and denied that claimant had permission to operate the bulldozer) testified falsely in nearly all respects. The ALJ also rejected the arguments that respondent was engaged in an agricultural pursuit and that respondent had an insufficient payroll to fall under the jurisdiction of the Kansas Workers Compensation Act (Act). The ALJ found claimant permanently injured his neck (but not his knees) and awarded claimant permanent partial disability benefits for an 8 percent whole person functional impairment. Lastly, the ALJ assessed the award of permanent partial disability benefits and medical benefits against respondent but assessed the costs of the transcripts to the Fund.

Claimant contends the ALJ erred by (1) failing to find he permanently injured his knees in the accident, and (2) disallowing his request for a work disability.¹ Claimant argues his medical expert, Dr. Edward Prostic, provided the more credible opinions and that the Board should adopt those opinions. In short, claimant requests the Board to find he has sustained a 14 percent whole person functional impairment, 30 percent task loss, an 85 percent wage loss, and a 57.5 percent work disability.

Respondent filed an application for review of the January 23, 2009 Award. Although requested, respondent did not file a brief with the Board but he did appear pro se at oral argument before the Board. Based on respondent's application for Board review, respondent is challenging the ALJ's findings that (1) claimant was an employee of respondent when the accident occurred, (2) claimant's accident arose out of and in the course of his employment with respondent, (3) claimant sustained permanent injury, and (4) respondent was capable of paying the workers compensation benefits awarded.

Lastly, the Fund contends respondent was engaged in an agricultural pursuant (cleaning a farm pond) at the time of the accident and, therefore, respondent is exempt from coverage under the Act. The Fund also maintains that respondent did not have a sufficient payroll to come under the Act as everyone who worked for respondent was allegedly an independent contractor. Next, the Fund asserts claimant failed to prove that he was an employee of respondent. And finally, the Fund maintains claimant sustained no permanent impairment as a result of the October 2005 accident and that there should be no fund liability as claimant failed to prove respondent was unable to pay whatever compensation is awarded in this claim.

¹ A permanent partial general disability under K.S.A. 44-510e greater than the functional impairment rating.

In summary, the issues before the Board on this appeal are:

1. Was claimant an employee of respondent at the time of his accident?
2. Did respondent have a sufficient payroll to come under the jurisdiction of the Act?
3. Is respondent exempt from the jurisdiction of the Act because he was engaged in an agricultural pursuit as provided by K.S.A. 44-505(a)(1)?
4. What is claimant's average weekly wage?
5. Is claimant entitled to both temporary total disability benefits and medical benefits?
7. What is the nature and extent of claimant's injury and disability?
8. What is the liability of the Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' stipulations and arguments, the Board makes the following findings and conclusions:

The resolution of this claim hinges upon the witnesses' credibility. Accordingly, a brief summary of the germane testimony is helpful. Claimant, who was 50-years-old at the time of the regular hearing, is a heavy equipment operator. The respondent, Jeff Chaney, is an excavating and dirt contractor who also has a small farm. Claimant maintains that Will Jones, respondent's alleged foreman, hired him to work for respondent as a bulldozer operator for \$12.50 an hour. According to claimant, he was hired to replace another bulldozer operator.²

Claimant alleges he worked for respondent for approximately three weeks and averaged 55 hours a week for an average weekly wage of \$687.50. Claimant believes he was paid twice by personal check by Mr. Chaney and paid once in cash from Mr. Jones. According to claimant, Mr. Chaney had him endorse both checks, which Mr. Chaney cashed for claimant at a convenience store.

² R.H. Trans. at 21-22.

Claimant maintains that respondent provided the heavy equipment and fuel and that Mr. Jones was his supervisor. Claimant further testified respondent employed three others, who earned \$14 per hour and worked 52 weeks a year.³ Claimant testified that before he was hired he spoke with Mr. Chaney about his dirt contracting business, his equipment, and his employees. However, claimant acknowledged he did not know whether Mr. Chaney owns or rents the heavy equipment. Moreover, claimant also acknowledged he never saw any of respondent's other alleged employees other than Mr. Jones.⁴

Claimant (who does not have a drivers license) testified that Mr. Jones (who also lacks a license) would pick him up at home in Chetopa, Kansas, and would take him to a ranch approximately two miles west of Edna, Kansas, where respondent was building eight new ponds. Claimant testified he assisted with two of the ponds before he sustained the October 19, 2005 accident. Claimant understood their next job was to be at Nowata, Oklahoma, and that it was supposed to take four to six months.⁵

According to claimant, his accident occurred while he was operating a bulldozer and helping remove huge slabs of rock from the bottom of the pond they were building. And as he positioned the bulldozer a huge slab or rock fell onto the bulldozer's blade, which jolted and catapulted claimant into the bulldozer's roll bars. The impact lacerated claimant's scalp. Claimant testified he immediately felt pain in his neck between his shoulder blades and back of his skull. Somewhat later, he allegedly developed pain in both knees.

Mr. Jones, who was operating a trackhoe at the site, witnessed the accident and allegedly transported claimant to a nearby house. Claimant was then taken to the Coffeyville Regional Medical Center for treatment. Mr. Jones promptly telephoned Mr. Chaney, who was in Tulsa, and reported the accident. At the Medical Center claimant was evaluated and discharged with a neck brace. Approximately three days later, claimant was taken back to the hospital's emergency room due to severe headaches and blood sacks that had formed around his eyes, nose and mouth. Claimant alleges he was taken to the emergency room on that second occasion by Mr. Jones' girlfriend. The only medical treatment that claimant has received was provided during his two emergency room visits.

Claimant asserts that Mr. Chaney promised to pay the medical bills and take care of claimant until he was back on his feet. Mr. Chaney also allegedly told claimant he had an ongoing job and that claimant's hourly rate would be increased two dollars per hour when claimant returned to work. Claimant maintains that he attempted to return to work

³ *Ibid* at 21.

⁴ *Ibid.* at 66.

⁵ *Ibid.* at 22-23.

but the jostling of the bulldozer caused him too much pain.⁶ Claimant alleges that Mr. Chaney offered to pay him \$20,000 and pay his medical bills if he would sign a release.

Claimant acknowledged that respondent did not withhold any taxes from his pay. Likewise, claimant acknowledged that he did not receive a Form W-2 from respondent for his 2005 income taxes. Claimant did not file either a state or federal tax return for 2005.

Claimant testified that he has not obtained full-time work since his accident. He has, however, performed some odd jobs around Chetopa, including plowing gardens, patching roofs, yard work, waxing floors, and helping with firewood. Claimant estimates that during a two-month period during the Spring of 2006 he earned \$100 per week.⁷ He also estimates that he helped wax and buff floors for about three weeks and earned, at most, \$170 per week. As a result of his accident, claimant contends he has pain and stiffness in his neck and problems with both knees, left worse than the right.

Jeff Chaney, respondent, testified that he is a self-employed heavy equipment operator. He denies hiring claimant to work for him or paying claimant to work. He denies meeting claimant until seeing him at the hospital the day of the accident. Likewise, Mr. Chaney contends that before the accident occurred he did not know that claimant was at the work site. And it was only later, after the telephone call from Mr. Jones, that he learned claimant was at the work site to look at rocks.

Mr. Chaney indicated he did not know how the bulldozer was started as he had the keys. Moreover, he denies promising to pay claimant's medical bills, to take care of claimant financially until he recovered, or to give claimant a \$2 per hour raise upon claimant's return to work. Similarly, Mr. Chaney denies giving Mr. Jones authority to hire claimant and that after the accident claimant tried to return to work and operated a bulldozer.

Mr. Chaney testified he had a contract to clean existing farm ponds on a ranch near Edna and that he had hired Mr. Jones to help him. According to Mr. Chaney, Mr. Jones owned a trackhoe that was used to scoop the mud and large stones in cleaning the ponds. Mr. Chaney testified he operated a rented bulldozer on the pond cleaning project but he was not at the work site on the date of accident as he had gone to Tulsa for parts.

Mr. Chaney testified that he hired people to work for him as independent contractors and that he did not withhold any money from their pay for taxes. Mr. Chaney produced

⁶ *Ibid.* at 35.

⁷ *Ibid.* at 45.

three months of bank records from the Welch State Bank that encompassed the period from September 7 to December 7, 2005. Those bank records indicated Mr. Chaney paid the following to Mr. Will Jones and Mr. Bobby Apperson:

To Will Jones: On September 14, 2005, the sum of \$604.50 for labor;
 On September 23, 2005, the sum of \$85 (not noted);
 On September 27, 2005, the sum of \$793 for labor;
 On October 5, 2005, the sum of \$643.50 for labor;
 On October 12, 2005, the sum of \$772.50 for labor.

To Bobby Apperson: On September 14, 2005, the sum of \$455 for labor;
 On September 27, 2005, the sum of \$575 or labor;
 On October 5, 2005, the sum of \$475 for labor;
 On October 12, 2005, the sum of \$510 for labor.

Mr. Chaney testified he paid Mr. Jones \$50 per hour for both his services and trackhoe.⁸

The record does not establish whether Mr. Apperson worked in respondent's excavation business or farming operation. The bank records also indicate Mr. Chaney made payments to others during the period in question for trucking services. The only check to claimant found among the three months of bank statements was drawn in the sum of \$70, dated November 5, 2005, and noted that it was for payment of pipe.

Those bank statements also indicate Mr. Chaney paid \$300 to Carol Chaney for labor by check dated September 17, 2005, and paid \$100 to Gary Chaney for labor by check dated October 3, 2005. Although they have the same last names, the record does not establish the relationship, if any, between respondent and these two individuals. Carol Chaney, however, might be either respondent's mother or daughter.⁹ In addition, Mr. Chaney paid \$40 to his nephew, Travis McClure, for labor by check dated September 14, 2005.

Mr. Chaney's testimony is uncontradicted that he had only one checking account in September and October 2005.¹⁰ And although he later opened another account, Mr.

⁸ Chaney Depo. at 47.

⁹ *Ibid.* at 54.

¹⁰ *Ibid.* at 20.

Chaney testified all of the checks to those who worked for him went through the account at the Welch State Bank referenced above.¹¹

Mr. Chaney's 2005 and 2006 income tax returns were also placed into the record. In the 2005 return, Mr. Chaney's farming operation was combined with his excavation business. The 2005 Schedule F showed, among other things, a net profit of \$9,750, \$15,247 in depreciation expense, \$117,255 for the rental of vehicles and machinery, and \$32,790 for contract labor.

The 2006 income tax return, however, separated the farm operation from the excavation business. That return showed \$8,540 in farm income and an \$18,612 loss in his excavation business. The Schedule C for the excavation business indicated respondent claimed \$22,039 for contract labor expense, \$15,893 in depreciation expense, and \$58,265 in rental expense. Neither the tax return nor any other evidence in the record establishes what portion of respondent's contract labor expense was paid to relatives.

Mr. Chaney testified he prepared a Form 1099 for Mr. Jones for the 2005 tax year. He also testified that he did not prepare or send claimant any form. In short, Mr. Chaney denies, among other things, hiring claimant, having any employees, and having a payroll that would bring his excavation business under the jurisdiction of the Act.

Mr. Jones testified that he first met claimant approximately a month before the accident while visiting one of claimant's neighbors.¹² According to Mr. Jones, claimant wanted some large rocks for landscaping his yard. Mr. Jones testified, in part:

Q. (Mr. Laskowski) Okay. What transpired when you met him at your friend's house?

A. (Mr. Jones) I was telling Jim about this job that we was working on digging these ponds. I was helping Jeff [Chaney] dig them up there with my hoe. And he was wanting some rocks to do some landscaping with. And I was -- it was going to be on a Saturday morning and I was going to go up there and work a half a day. And I told him if he wanted some of them rocks, he was willing to -- I'd come by and pick him up and take him up there. Because he don't have a vehicle, he rides a bicycle everywhere he goes. And so if he wanted some of them rocks, he could put them in my pickup and I'd haul them back home for him.

Q. Did he agree to that?

¹¹ *Ibid.* at 62.

¹² Jones Depo. at 5.

A. Yeah.¹³

Although Mr. Jones implies the accident occurred on a Saturday, the 2005 calendar reveals claimant's accident occurred on a Wednesday.

According to Mr. Jones, the day of the accident was the first time claimant had been to the job site. Mr. Jones indicated the accident occurred when claimant drove the bulldozer approximately one-fourth mile to where Mr. Jones was removing rock from the bottom of a pond and a large rock from the trackhoe's bucket struck the bulldozer. Mr. Jones contends he did not authorize claimant to operate the bulldozer and that he did not realize the bulldozer was nearby.

Mr. Jones contends he owned the trackhoe he was operating when claimant was injured. He also testified doing contract work for respondent and that he was paid in cash when a job was completed. Mr. Jones denies hiring claimant to work for respondent and, likewise, denies telling claimant he was respondent's foreman. Mr. Jones denies knowing anything about claimant endorsing paychecks from Mr. Chaney and then Mr. Chaney cashing them.

The ALJ found Mr. Jones was not a credible witness. The ALJ had good reason. Mr. Jones admitted he had an old felony conviction for stealing cattle. Moreover, he falsely testified that he only received cash from Mr. Chaney, when, in truth, he received checks. He also initially testified that he reported his yearly earnings to the Social Security Administration, which pays him disability benefits, but he later admitted that he did not report that information. He also testified that he has not filed any income tax returns since 1999 because of a dispute with the Internal Revenue Service over withholding his refunds for child support. In addition, he provided implausible testimony about giving Mr. Chaney \$4,000 that he received for his trackhoe, which was allegedly destroyed by fire in 2006 and sold for scrap. In short, Mr. Jones' testimony is suspect.

As indicated above, this claim hinges primarily upon the witnesses' credibility. Respondent, however, has bank statements that supports his testimony that he never paid claimant for working. Stated another way, those documents tend to disprove claimant's testimony that respondent paid him for working. There are also emergency room records in evidence. And the emergency room records from claimant's first visit show claimant's employer was Will Jones, but the records from the second visit show claimant's employer was Chaney Far[ms].

¹³ Jones Depo. at 6.

It is not likely that claimant possessed a key that perchance started the bulldozer. And claimant did not testify how he started the machine or where he obtained the key. On the other hand, the two checks from Mr. Chaney that claimant swore he endorsed do not appear in the bank records. Mr. Chaney's testimony that he wrote checks to those who worked for him is credible as that would be common practice for a business owner who desires proof of payment for various reasons, including taxes. There is nothing in Mr. Chaney's testimony that indicates his testimony was false. And the fact that Mr. Chaney took claimant home from the hospital the day of the accident does not, in the Board's opinion, tend to prove that claimant was an employee.

In summary, after considering the entire record the Board finds claimant has failed to prove he was an employee of respondent at the time of his October 19, 2005, accident.

Jurisdiction of the Act

The Fund has also argued that claimant's accident did not fall under the jurisdiction of the Act because (1) respondent was engaged in an agricultural pursuit and (2) claimant failed to prove respondent had the requisite payroll.

K.S.A. 44-505 reads, 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:

(1) Agricultural pursuits and employments incident thereto, other than those employments in which the employer is the state, or any department, agency or authority of the state . . .

In addition to running his excavation business, Mr. Chaney also raised cattle. Other than owning a home on 20 acres and listing the property that is being depreciated in his tax records, the evidence is relatively scant about respondent's farming or ranching operation. Nevertheless, the Fund argues that cleaning ponds is an incident of an agricultural pursuit and, therefore, claimant's accident does not fall within the jurisdiction of the Act. The issue of whether claimant was engaged in an agricultural pursuit at the time of his accident is controlled by the *Frost*¹⁴ decision. In that decision the Kansas Court of Appeals held that determining whether an injured worker was engaged in an agricultural pursuit at the time of an accident requires a two-step analysis. The first question is whether the employer was engaged in an agricultural pursuit. If the answer is 'no', then the court may find there is coverage under the Workers Compensation Act. If the answer

¹⁴ *Frost v. Builders Service, Inc.*, 13 Kan. App. 2d 5, 760 P.2d 43, rev. denied 243 Kan. 778 (1988).

is 'yes', then the court must determine if the accident occurred while the employee was engaged in an employment incidental to the agricultural pursuit.

Here, respondent had two separate business interests -- one agricultural and one not. There is no question that claimant's accident occurred during the course of respondent's excavation business. Consequently, the Board finds and concludes claimant was not involved in an agricultural pursuit at the time of his accident and, therefore, his accident may fall under the jurisdiction of the Act.

Next, the Fund argues that respondent did not satisfy the payroll requirements to fall under the jurisdiction of the Act. K.S.A. 44-505(a)(2) provides that the Act does not apply to:

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 \$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. (Emphasis added.)

Accordingly, that statute specifically excludes the payment of wages to family members. Likewise, the statute impliedly excludes payments to bona fide independent contractors.

There is no evidence of respondent's 2004 payroll. And although respondent paid more than \$30,000 for contract labor in 2005, the record does not further break that down into what should be excluded as payment to respondent's family members and what should be excluded as payment to actual independent contractors. For example, the three months of respondent's 2005 bank statements that were provided indicated respondent paid \$720 to K & C Construction and \$440 to Paul Wallace for trucking services. Without more information, it is not possible to determine whether those and any similar payments to trucking companies or individuals were made to genuine independent contractors or, instead, to someone who should be considered an employee for purposes of the Act. In summary, the record does not establish that respondent had a sufficient payroll to bring Mr. Chaney under the jurisdiction of the Act.

Based upon the above, the Board finds that claimant's claim for benefits should be denied. Accordingly, the remaining issues are rendered moot.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated January 23, 2009, is modified as claimant’s request for benefits is denied. The administrative costs of this proceeding as set forth in the Award are assessed against the Fund.

IT IS SO ORDERED.

Dated this 26th day of February 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority that this claim is not compensable. I would affirm the ALJ’s finding of compensability but for a different reason. The Act applies to this claim because claimant was hired by Mr. Jones who was a subcontractor of Mr. Chaney. At the time of his accident, claimant was working as an employee of Mr. Jones, an independent contractor, who in turn was working for Mr. Chaney, the principal contractor. This is supported by the contemporaneous hospital emergency room record. As such, claimant’s accident arose out of and in the course of his employment with respondent.¹⁵ Claimant’s pay and the payrolls of Mr. Jones and the other subcontractors of Mr. Chaney’s

¹⁵ K.S.A. 44-503.

excavation business are imputed to Mr. Chaney as statutory employees.¹⁶ Based on respondent's tax records this satisfies the minimum payroll requirement of the Act. Finally, I concur with the majority's determination that Mr. Chaney's excavation business was not involved in an agricultural pursuit.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Jeff Chaney, Respondent, PO Box 7, Welch, OK 74369
Ronald J. Laskowski, Attorney at Law
David J. Bideau, Attorney for Fund
Thomas Klein, Administrative Law Judge

¹⁶ See *Bright v. Cargill, Inc.*, 251 Kan. 287, 837 P.2d 348 (1992); *Hollingsworth v. Fehrs Equipment Co.*, 240 Kan. 398, 729 P.2d 1214 (1986); *Hanna v. CRA, Inc.*, 196 Kan. 156, 409 P.2d 786 (1966).