

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

<b>IVAN C. MOORE</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>TALLGRASS OUTDOOR ADVENTURES, LLC</b>	)	
Respondent	)	Docket No. 1,031,020
	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant and respondent requested review of the January 12, 2007, preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

**ISSUES**

The Administrative Law Judge (ALJ) found that claimant was an independent contractor. Accordingly, claimant’s request for workers compensation benefits was denied. The ALJ also found that “had the Respondent acted in a responsible and business-like manner, it would have anticipated that its payroll—paid or not—would have met the \$20,000.00 threshold.”<sup>1</sup>

Claimant requests that the Order of the ALJ be modified to find that claimant was not an independent contractor but was an employee of respondent and, thereby, was eligible for workers compensation benefits. Claimant also argues that respondent had or should have expected to have a payroll in excess of the \$20,000 threshold and that the ALJ’s Order should be affirmed in that respect.

Respondent asserts that claimant was not an employee on the date of his accident but was, instead, an independent contractor and requests the ALJ’s order be affirmed as to that issue. Respondent, however, argues that it did not meet the threshold amount of

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<sup>1</sup> ALJ Order (filed Jan. 12, 2007) at 1.

payroll for calendar years 2005 and 2006 for application of the Workers Compensation Act. The respondent argues that the ALJ's application of a *quantum meruit* analysis to determine respondent's anticipated payroll has no support in Kansas law.

The Kansas Workers Compensation Fund (Fund) requests the Board affirm the ALJ's finding that claimant was an independent contractor at the time of his injury at respondent. The Fund also asserts that claimant did not establish that he suffers from a temporary total disability. The Fund contends the respondent's payroll did not exceed \$20,000 in either 2005 or 2006, nor was there any evidence that respondent reasonably expected that its payroll would exceed \$20,000 in 2006. Further, the Fund contends the respondent failed to establish that it is insolvent or unable to pay amounts that may be required.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Respondent is a hunting lodge bed and breakfast. It provides opportunities for people to go on guided hunting expeditions. Claimant testified he began working for respondent sometime in February or early March 2006. Claimant had responded to an advertisement in the newspaper that respondent was looking for hunting guides. He contacted the owner, Mr. Kirk Cherry, and talked to him about the guide job. After talking to Mr. Cherry again the next day, Mr. Cherry offered claimant a management position at respondent as ranch manager. Claimant said Mr. Cherry told him he would be paid \$2,500 a month or \$10 per hour but said he did not know how he would be able to pay him. It was claimant's understanding that respondent was just getting started in business and had yet to generate any revenue.

Mr. Cherry testified that during his first conversation with claimant, he told claimant that the people associated with respondent would be "1099 contractors."<sup>2</sup> Mr. Cherry said that claimant told him he ran a business and knew what that meant. Mr. Cherry and claimant met again in early March 2003 and discussed that claimant could use his farming skills at respondent. Mr. Cherry said claimant was told that respondent was not generating any revenue so that any work he did would be "voluntary."<sup>3</sup> Mr. Cherry admitted he never asked claimant to sign a contract or a 1099 form of any kind.

Claimant testified he was never asked to sign a contract of any nature and was never told he was an independent contractor. He was provided a gas card and used the

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<sup>2</sup> P.H. Trans. at 54

<sup>3</sup> *Id.* at 55.

gas card to fill his truck and to buy gas and product for use on the ranch. Claimant was provided a shirt from respondent and was given business cards that identified him as respondent's ranch manager/chief guide. Claimant was also identified on respondent's website as respondent's ranch manager/chief guide. Claimant stated that he worked an average of 70 hours per week from either February or early March to June 2006. He said at times he used some of his own tools.

While he worked for respondent, he was a guide on two turkey hunts in May 2006. He was paid \$200 for his services as a guide on one of the hunts and \$300 for his services as a guide on the second hunt. However, claimant states that as of May 2006, he had not been paid for any of his services as ranch manager.

Claimant admits that he received \$8,212.92 from respondent payable to claimant's business, Northwinds Archery, and that claimant was to use the money to order deer feeders and deer stands for respondent. Claimant testified that he ordered the equipment but in May cancelled the order and decided to keep the \$8,212.92 and deduct that amount from the amount he felt he was owed by respondent in wages. He told Mr. Cherry in June that he had not used the money to order equipment but had kept the money as wages. Claimant also told Mr. Cherry in June that he was in need of money, and respondent wrote three checks in the total amount of \$4,693.60. One check was payable to Matt Janke, a creditor of claimant. The other two checks were marked "cash advance" and were payable to claimant.

Mr. Cherry testified he asked claimant a couple of times about the deer stands and deer feeders he had ordered from claimant's company, and claimant told him that the stands were being ordered from overseas and would take about six weeks to come in. Mr. Cherry eventually asked for a return of the money he had advanced for the feeders and stands and said claimant told him he would return the money after he refinanced his house. However, Mr. Cherry has never been repaid that money.

By June 2006, claimant decided he was not going to serve as the ranch manager for respondent any longer because he was not getting paid like he had expected. He said he had been told that when respondent's business took off, he would be well compensated for his work. In June he figured out that was not going to happen and he quit as ranch manager but was still serving as chief guide. He said that when he left in June, it was understood that when he was needed at respondent, they would call him.

Mr. Cherry testified that claimant never told him that he quit in June 2006. During a conversation Mr. Cherry had with claimant on September 5, Mr. Cherry told claimant he was no longer trustworthy and could not be considered for a management position with respondent but would only be used as a guide.

In September 2006, claimant was contacted by Ed Savage, respondent's lodge manager, who asked him to act as a guide on September 11. Claimant was promised

payment for his services in cash at the rate of \$100 per day. Claimant was told which persons to take on the hunt. Claimant testified that he used his own equipment to guide, but later stated that his only equipment was his camouflaged clothing. The shirt he wore was the shirt that had been issued to him by respondent. He did not take a shotgun with him. He did use his own pickup to transport the hunters. At his deposition, claimant stated that he determined where he took the hunters because he was familiar with the grounds. However, at the preliminary hearing, he said that he was told by Mr. Cherry and Mr. Savage where to take the hunters. He explained that after he was told where to take the hunters, he decided where specifically to place the hunters. In addition to the \$300 in cash claimant was paid for the three-day hunt, he was also given about \$30 to use for gas to drive his pickup.

On September 11, 2006, during the hunt, claimant was walking some rim rock and stepped into a hole, fell backwards, and twisted his right ankle. He was seen in the emergency room right away. Respondent did not provide any treatment for claimant; claimant got all his treatment on his own. Claimant had an MRI performed, which showed he had a fracture of his right ankle. Claimant was told his fracture could take up to 12 months to heal. Claimant has not worked since September 11 and has not worked anywhere for earned income since then. He has not been released to return to work.

Mr. Cherry testified that only five people were paid for services performed for respondent in 2006, all of whom were considered 1099 contractors. One of those contractors was Delinda Solata, who did some cooking for respondent and who owned her own catering service. The other four contractors, including claimant and Mr. Savage, were paid for their services as guides. Mr. Cherry did not pay more than \$15,000 for the cost of all these services. He did not expect to pay more than \$15,000 in wages in 2006.

The ALJ found that even though the respondent did not pay wages totaling \$20,000 in any calendar year, the test “is not what an employer actually paid in a calendar year, but what the employees earned.”<sup>4</sup> Utilizing *quantum meruit* to determine the value of the services claimant rendered to respondent, the ALJ determined respondent would have or should have paid in excess of the \$20,000 threshold necessary for the Workers Compensation Act to apply.<sup>5</sup> Nevertheless, the ALJ held that claimant was ineligible for workers compensation benefits because at the time of his accident, he was working as a self-employed subcontractor.<sup>6</sup>

In his Order, the ALJ accurately sets forth the applicable law and test for determining whether a worker is an employee or an independent contractor. It is not

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<sup>4</sup> ALJ Order (filed Jan. 12, 2007) at 1.

<sup>5</sup> See K.S.A. 44-505(a).

<sup>6</sup> See K.S.A. 44-503(a).

necessary to repeat those here. This Board Member finds that whatever arrangement claimant and respondent may have had when claimant initially undertook to perform services for respondent, that arrangement was terminated sometime between June 2006 and September 5, 2006. When claimant was injured on September 11, 2006, he was working for respondent as an independent contractor.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>7</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>8</sup>

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated January 12, 2007, is affirmed as to the finding that claimant was an independent contractor on the date of his accident and injury and, therefore, benefits are denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2007.

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Rodney C. Olsen, Attorney for Respondent  
Penny R. Moylan, Attorney for Kansas Workers Compensation Fund  
Bryce D. Benedict, Administrative Law Judge

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<sup>7</sup> K.S.A. 44-534a.

<sup>8</sup> K.S.A. 2006 Supp. 44-555c(k).