

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

<b>DAVID ALAN JOHNSON</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>MAXIMUM TREE SERVICE</b>	)	Docket No. 1,032,367
Uninsured Respondent	)	
	)	
AND/OR	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

The Workers Compensation Fund requests review of the March 22, 2007 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

**ISSUES**

The Administrative Law Judge (ALJ) found the respondent has a sufficient gross annual payroll to meet the requirements of K.S.A. 44-505 and therefore is subject to the jurisdiction and provisions of the Workers Compensation Act (Act). Pursuant to K.S.A. 44-532, the Workers Compensation Fund (Fund) was ordered to pay claimant's benefits.

The Fund requests review of whether the respondent is exempt from the Act and whether the claimant has sustained his burden of proof that his accidental injury arose out of and in the course of employment. The Fund argues the respondent did not have a sufficient payroll to be subject to the Act.

Claimant argues the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

Mr. Johnson was hired by Phil Blocker, respondent's owner, to work an ice storm in Fairview, Illinois. The claimant's job was climbing trees and cutting tree branches with

a chainsaw. For the job in Illinois, the claimant was to be paid \$15 an hour and it was usually in cash. Claimant was under the impression that upon return from Illinois he would have a full-time job working 40 hours a week.

On December 8, 2006, claimant was pruning a tree when his spike slipped or the limb broke and he swung back into the tree. He injured his wrist and shoulder. Claimant borrowed a co-worker's cell phone and called Phil Blocker to let him know about his injury. There was intense pain in his wrist and shoulder. Mr. Blocker advised the claimant to go back to the hotel room and put ice on it. The next morning claimant was advised by respondent that his services were not needed anymore. On December 13, 2006, claimant sought medical treatment at the hospital's emergency room.

Claimant testified he was paid \$15 an hour and his wife received \$10 an hour which they both were paid cash. Another employee also received cash for his services which was \$12 an hour.

Kara Carter, claimant's wife, testified on claimant's behalf that she earned \$10 an hour and it was paid by cash. She further testified the claimant did suffer an accidental injury while trimming tree branches. Ms. Carter also corroborated claimant's testimony that he used a co-worker's cell phone to call Mr. Blocker and that he did not hurt himself while wrestling the night before the accident. She also indicated that there were at least five individuals including Mr. Blocker that were working for Maximum Tree Service.

Phillip Blocker owns Maximum Tree Service. He testified that he is a farmer and also operates the business that trims trees. He noted that the tree business primarily trims trees after storms or natural disasters. But he agreed that there was also trimming of trees through the year in the Wichita area. Maximum Tree Service was involved in the cleanup from Hurricanes Katrina and Rita as well as the cleanup after an ice storm in Fairview, Illinois. Mr. Blocker testified he gets some of his help through Manpower or Labor Ready. He also has two individuals that he hires quite regularly as independent contractors. Mr. Blocker denied he had a payroll of more than \$20,000 in the past year or that he expected a payroll to exceed that amount in the current year.

However, he agreed he had one employee who was paid \$9 an hour that worked approximately two days a week driving a truck for respondent. And there were two men he described as subcontractors who worked for him quite a bit. He later agreed that Tammy Coe had worked for him for two months and was paid \$10 an hour. And there was initially a crew of four at the Fairview job. Mr. Blocker finally agreed that, based upon what he was paying the crew in Fairview, the aggregate payroll would amount to \$1,500 per week if everyone worked full time. Mr. Blocker agreed to provide tax information as well as records to demonstrate how much he had paid the alleged subcontractors.

The claimant testified that Mr. Blocker operated the tree trimming business full time and had friends that had worked for respondent. And the claimant testified that respondent

did have crews out working every week of the year. Phil Shake also worked the Fairview job and noted he was paid \$12 an hour. He further stated that respondent had two pickups, two dump trucks, a bucket truck and a trailer. Mr. Shake had worked for respondent in Louisiana and there were six people on that crew.

The administrative file indicates that after the preliminary hearing the claimant requested that the ALJ delay a decision until after submission of a scheduled deposition of Mr. Blocker. On February 12, 2007, the ALJ issued an Order which indicated all issues raised at the preliminary hearing were taken under advisement until receipt and review of Mr. Blocker's deposition transcript. In a February 27, 2007 letter to the ALJ, the claimant's counsel noted that two attempts to obtain service on Mr. Blocker were unsuccessful as the subpoenas were returned both times. Consequently, claimant requested the ALJ to proceed with her decision.

It is the claimant's burden of proof to establish his right to an award of compensation and to prove those conditions on which the claimant's right depends.<sup>1</sup> Claimant's burden to prove coverage under the Act, also includes whether respondent has the requisite payroll requirements as set forth in the Act.<sup>2</sup> K.S.A. 44-505(a)(2) exempts from application of the Kansas Workers Compensation Act the following:

any employment, . . . 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;

In order to avoid being subject to the provisions of the Kansas Workers Compensation Act, the above statute establishes a two-prong test. First, the employer must not have had an annual payroll for the preceding calendar year greater than \$20,000. Secondly, the employer must reasonably estimate that it will not have a gross annual payroll for the current calendar year of more than \$20,000 for all employees excluding family members.<sup>3</sup>

The ALJ analyzed the evidence in pertinent part:

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<sup>1</sup> *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).

<sup>2</sup> *Brooks v. Lochner Builders, Inc.*, 5 Kan. App. 2d 152, 613 P.2d 389 (1980).

<sup>3</sup> *Fetzer v. Boling*, 19 Kan App. 2d 264, 867 P.2d 1067 (1994).

5. Mr. Blocker's payroll consists of Manpower and Labor Ready employees as well as other employees hired directly by him. His crew during the ice storm included claimant, Kara Carter, Phil Shake, Tammy Coe and one Labor Ready assigned worker. He also hired two workers to replace claimant, Kara Carter and Phil Shake when they were dismissed from the job. Mr. Blocker also employees [sic] a full time farm worker who performs part time on an as needed basis for Maximum Tree Service. The salary paid to these workers varied from \$10.00 to \$15.00 per hour. Mr. Blocker has uniforms for Maximum Tree Service workers as well as equipment including four trucks, a trailer and a skid steer.

6. Phil Blocker was subpoenaed twice to provide additional testimony and financial records regarding Maximum Tree Service and his farm operation. He did not respond to the subpoenas.

7. Mr. Blocker testified at the hearing that he does not have workers compensation insurance and that all of his financial matters for Maximum Tree Service are included in his financial matters for his farm operation.

8. The Court finds that Phil Blocker satisfies the gross annual payroll requirements of K.S.A. 44-505 and is therefore subject to the jurisdiction and provisions of the Kansas Workers Compensation Act.<sup>4</sup>

Mr. Blocker denied that the previous year he had a payroll greater than \$20,000 but agreed to provide income tax information and records showing how much he had paid the alleged subcontractors. Mr. Blocker's testimony at the preliminary hearing can best be described as evasive regarding the number of employees he paid or how much work they did. Initially, he stated respondent had no employees but then he agreed there was an employee who primarily did his farm work but worked two days a week driving a truck for respondent. Then he agreed Tammy Coe had worked for respondent for two months. In sum it was difficult to determine how many employees respondent had paid.

After the preliminary hearing the claimant then attempted to depose Mr. Blocker but noted that his two attempts to obtain service resulted in the subpoenas being returned both times and the certified letter was returned. Again this shows that Mr. Blocker is simply evading efforts to determine respondent's payroll.

This Board Member finds it proper to consider the payments to the alleged two subcontractors that Mr. Blocker stated worked for him. The phrase "all employees" as it is used in K.S.A. 44-505 must be construed to include subcontractors when as in this instance, that relationship has not been proven. Otherwise, companies such as respondent could avoid liability merely contracting with individuals to trim trees, declaring them independent contractors, and arguing, as respondent does here, that it has no employees and an insufficient payroll upon which to base jurisdiction of the Act. Such an

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<sup>4</sup> ALJ Order (Mar. 22, 2007) at 2.

arrangement subverts the provisions of K.S.A. 44-503, which is to prevent employers from evading liability under the act by contracting with outsiders to do work which they have undertaken to do as part of their trade or business.<sup>5</sup> Thus, this Board Member finds it is appropriate to consider the payments to the two non-familial alleged subcontractors. And Mr. Blocker agreed that what he paid those two plus payments to other people was maybe more than \$20,000. Moreover, independent of payments to the alleged subcontractors and based solely upon the salaries paid the admitted employees it is apparent that respondent could expect to have a payroll of more than \$20,000.

This Board Member further affirms the ALJ's finding that claimant met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment on December 8, 2006, while trimming trees for respondent.

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>6</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>7</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated March 22, 2007, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May 2007.

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BOARD MEMBER

c: David M. Bryan, Attorney for Claimant  
John C. Nodgaard, Attorney for Fund  
Phillip Blocker, PO Box 664, Cheney, KS 67025  
Nelsonna Potts Barnes, Administrative Law Judge

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<sup>5</sup> *Rodriguez v. John Russell Constr.*, 16 Kan. App. 2d 269, 826 P.2d 515 (1991).

<sup>6</sup> K.S.A. 44-534a.

<sup>7</sup> K.S.A. 2006 Supp. 44-555c(k).