

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

WILLIAM C. O'BANNON
Claimant

VS.

SWIFT TRANSPORTATION COMPANY, INC.
Self-Insured Respondent

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Docket No. 1,033,344

ORDER

Respondent appealed the May 10, 2007, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

On August 14, 2006, claimant was injured while driving a leased truck and delivering a load for respondent. The issue presented at the preliminary hearing before Judge Howard was whether claimant was employed by respondent as an employee, independent contractor, or as an owner-operator. In the May 10, 2007, Order, Judge Howard found that at the time of his accident claimant worked for respondent as an employee for purposes of the Kansas Workers Compensation Act. Consequently, the Judge awarded claimant both medical benefits and temporary total disability benefits.

Respondent contends claimant is precluded from receiving any benefits under the Workers Compensation Act under K.S.A. 2006 Supp. 44-503c. Respondent argues that statute absolves it of any liability under the Act as claimant (1) was an owner-operator, and exclusive driver, of a motor vehicle, (2) had occupational accident insurance, and (3) was not considered an employee under any federal law. In the alternative, respondent argues claimant should not receive any workers compensation benefits as he worked for respondent as an independent contractor and he is now estopped from claiming he worked for respondent as an employee. Accordingly, respondent requests the Board to reverse the May 10, 2007, Order.

Conversely, claimant argues the Order should be affirmed. Claimant contends he was not an owner-operator as defined by K.S.A. 2006 Supp. 44-503c and, therefore, that statute does not prevent him from receiving workers compensation benefits. He also contends he should be considered an employee of respondent for purposes of the Workers

Compensation Act because the control respondent exercised over him, and various other factors, indicate his relationship with respondent was more as an employee than an independent contractor.

The only issues before the Board on this appeal are:

1. Does K.S.A. 2006 Supp. 44-503c preclude claimant from receiving workers compensation benefits from respondent?
2. If not, for purposes of the Workers Compensation Act did claimant work for respondent as an employee or as an independent contractor?
3. If claimant worked for respondent as an employee, does equitable estoppel prevent him from receiving workers compensation benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes the preliminary hearing Order should be affirmed.

Respondent is a trucking company. On August 14, 2006, claimant was injured while delivering a load for respondent. Respondent does not dispute that accident. But respondent does dispute that claimant should be considered an employee for purposes of the Workers Compensation Act.

Claimant worked for respondent off and on for many years. Indeed, from April 2005 through April 2006 claimant owned his own truck and worked for respondent as an owner-operator. And before working as an owner-operator, it is undisputed that claimant worked for respondent for three months as an employee.

But at the time of the accident, claimant was working for respondent under an agreement he had signed in April 2006, which indicated he was an independent contractor. Moreover, at the time of the accident, claimant was driving a truck that he was leasing from Interstate Equipment Leasing (Interstate). The address used by Interstate in an equipment leasing agreement between Interstate and someone else is the same address used by respondent in the certificate attached to the Contractor Agreement that claimant executed in April 2006. In addition to respondent and Interstate sharing the same address, claimant testified he wrote a \$10,000 check to respondent at the time he began leasing the truck from Interstate. Moreover, if claimant drove more than 11,000 miles per month,

respondent withheld 10 percent of claimant's pay for the overage. At the end of the lease, the truck reverted to the lessor unless it was purchased for 37 percent of its initial cost.

Respondent required claimant to install a Qualcomm communications system on the truck, which cost claimant \$26 per week that respondent withheld from his pay. Claimant was responsible for the insurance on his leased truck. Likewise, claimant was responsible for the truck's maintenance and repair. In addition, claimant purchased accident insurance, which apparently provided him some medical benefits and weekly disability checks following the August 2006 accident.

Respondent exercised a significant degree of control over claimant. Claimant was restricted from driving for any other company and from accepting loads from anyone other than respondent. Respondent required claimant to send it a driver status report every day at 8:00 a.m. Respondent instructed claimant where to pick up a load, what time to deliver it, the maximum speed he could drive, and whether he could have any passengers. And if respondent approved, claimant could hire employees.

Claimant's pay was based upon the miles he drove. Nevertheless, he would sometimes receive detention pay if he had to wait more than two hours to pick up a load. He also received a \$250 holiday bonus if he worked through Christmas and New Year's. Respondent also reimbursed claimant for toll road charges. The pay to lumpers (individuals who helped unload), however, was deducted from claimant's pay. At the time of the accident, respondent was not withholding taxes from claimant's pay and it reported claimant's earnings on a Form 1099.

David Hamilton also testified at the May 2007 preliminary hearing. Mr. Hamilton is respondent's manager over owner-operators and independent contractors at the Edwardsville, Kansas, facility, which dispatched claimant. According to Mr. Hamilton, respondent had three types of drivers. Some drivers were employees, some were owner-operators, and some were independent contractors. Mr. Hamilton indicated the owner-operators brought their trucks from outside vendors. But independent contractors leased their vehicles from Interstate Leasing¹, with respondent guaranteeing the lessee will make the truck payments as respondent withholds funds from the lessee's earnings. And according to Mr. Hamilton, at the time of claimant's accident, respondent considered claimant an independent contractor.

Mr. Hamilton also explained that company employees cannot turn down loads except for family emergencies or excess hours of service. But owner-operators can decline loads without any repercussions. In addition, employees are paid 26 to 35 cents

¹ P.H. Trans. at 38.

per mile on a sliding scale based upon seniority but owner-operators and independent contractors are paid 92 cents per mile loaded and 81 cents per mile empty. And owner-operators are not required to follow the suggested routes, which have been selected based on fuel costs, but they are free to go any route they wish and purchase fuel anywhere they desire. Mr. Hamilton confirmed, however, that claimant could not haul any loads for anybody but respondent as claimant's truck was operated under respondent's ICC number.

Respondent contends it has no liability to claimant under the Workers Compensation Act under K.S.A. 2006 Supp. 44-503c as claimant was allegedly an owner-operator of the truck he was driving for respondent. This Board Member disagrees.

Under the Workers Compensation Act, owner-operators who are the exclusive driver of a motor vehicle that is leased to a licensed motor carrier shall not be considered an employee of that motor carrier for purposes of the workers compensation act when the owner-operator is covered by an occupational accident insurance policy *and* is not treated under the contract with the motor carrier as an employee for purposes of the federal insurance contribution act, federal social security act, federal unemployment tax act, and federal statutes prescribing income tax withholding at the source. But the Act also defines owner-operator as the owner of a motor vehicle that is driven exclusively by the owner under a lease agreement or contract with a licensed motor carrier. K.S.A. 2006 Supp. 44-503c reads, in part:

(a) (1) Any individual who is an owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be considered to be a contractor or an employee of the licensed motor carrier within the meaning of K.S.A. 44-503, and amendments thereto, or an employee of the licensed motor carrier within the meaning of subsection (b) of K.S.A. 44-508, and amendments thereto, and the licensed motor carrier shall not be considered to be a principal within the meaning of K.S.A. 44-503, and amendments thereto, or an employer of the owner-operator within the meaning of subsection (a) of K.S.A. 44-508, and amendments thereto, if the owner-operator is covered by an occupational accident insurance policy and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. § 3101 *et seq.*, the federal social security act, 42 U.S.C. § 301 *et seq.*, the federal unemployment tax act, 26 U.S.C. § 3301 *et seq.*, and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. § 3401 *et seq.*

(2) As used in this subsection:

.....

(C) "owner-operator" means an individual who is the owner of a single motor vehicle that is driven exclusively by the owner under a lease agreement or contract with a licensed motor carrier.

Because claimant leased and did not own his truck, he does not meet the definition of an owner-operator and, therefore, K.S.A. 2006 Supp. 44-503c does not preclude him from receiving workers compensation benefits. Accordingly, the next issue that must be addressed is whether claimant's relationship with respondent was one of employer-employee or whether claimant was an independent contractor for purposes of the Workers Compensation Act.

It is often difficult to determine in a given case whether a person is an employee or independent contractor since there are elements pertaining to both that may occur without being determinative of the relationship.²

There is no absolute rule for determining whether an individual is an independent contractor or an employee.³ The relationship of the parties depends upon all the facts and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.⁴

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed. It is not the actual interference or exercise of the control by the employer but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.⁵

In addition to the right to control and the right to discharge a worker, other commonly recognized tests of the independent contractor relationship are: (1) the existence of a contract to perform a certain piece of work at a fixed price; (2) the independent nature of the worker's business or distinct calling; (3) the employment of assistants and the right to supervise their activities; (4) the worker's obligation to furnish tools, supplies, and materials; (5) the worker's right to control the progress of the work; (6) the length of time

² *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

³ *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

⁴ *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

⁵ *Wallis*, 236 Kan. at 102-103.

that the worker is employed; (7) whether the worker is paid by time or by the job; and (8) whether the work is part of the regular business of the employer.⁶

Judge Howard considered the nature of respondent's business, the control that respondent exercised over claimant, and respondent's right to discharge claimant and determined claimant was an employee for purposes of the Act. And this Board Member agrees.

Respondent retained significant control over claimant and retained the right to terminate his services. Claimant neither held himself out as an independent trucking company to the general public nor did he offer his services to the general public while employed by respondent. Claimant did not have any assistants and, indeed, could not hire any without respondent's approval. Claimant worked for respondent only and the parties intended their relationship to last a considerable period of time. Moreover, claimant did not contract with respondent on a piece-work basis. And, finally, delivering freight was respondent's principal business activity.

In conclusion, claimant worked for respondent more in the nature of an employee rather than an independent contractor.

Respondent contends equitable estoppel prevents claimant from now claiming he is an employee rather than an independent contractor. That was not made an issue at the May 8, 2007, preliminary hearing, nor was it addressed by the Administrative Law Judge. Therefore, that issue will not be considered for the first time on appeal. Respondent may preserve that defense for final award.

Based upon the above, the preliminary hearing Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ 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), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the May 10, 2007, Order entered by Judge Howard.

⁶ *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

⁷ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of August, 2007.

BOARD MEMBER

c: John R. Stanley, Attorney for Claimant
Allan H. Bell, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent
Steven J. Howard, Administrative Law Judge