BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICARDO TERRELL Claimant VS. **BEST CHOICE DELIVERY, INC.** Uninsured Respondent AND **WORKERS COMPENSATION FUND**	)))))))))))	Docket No. 1,033,359

RICARDO TERRELL Claimant VS. **MATTRESS FIRM** Respondent AND **TWIN CITY FIRE INSURANCE CO.** Insurance Carrier	)))))))))))	Docket No. 1,033,360

ORDER

Respondent, Mattress Firm, and its insurance carrier, Twin City Fire Insurance Co., request review of the April 12, 2007 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

Claimant was employed by respondent Best Choice Delivery, Inc. (Best Choice) as a delivery driver. Best Choice had contracted with respondent Mattress Firm to deliver its products. While on the premises of Mattress Firm on January 6, 2007, the claimant was unexpectedly tackled by one of Mattress Firm's employees which caused a low back injury.

Claimant filed claims against both respondents and since Best Choice was uninsured the Kansas Workers Compensation Fund (Fund) was included in that claim. The claims were consolidated for the preliminary hearing held April 11, 2007.

The Administrative Law Judge (ALJ) determined claimant was an employee of Best Choice which worked exclusively for Mattress Firm. The ALJ further determined claimant was a statutory employee of Mattress Firm and it was ordered to provide claimant's workers compensation benefits.

The Mattress Firm and Twin City Fire Insurance Co. request review of whether claimant's accidental injury arose out of and in the course of employment. Mattress Firm argues claimant was engaged in horseplay and did not sustain his burden of proof to establish his injury arose out of and in the course of employment. Mattress Firm further argues claimant was a subcontractor of an independent contractor to Mattress Firm and therefore claimant is not respondent's statutory employee. Mattress Firm also argues the medical evidence did not support an award of medical compensation or temporary total disability compensation.

Conversely, Best Choice, the Fund and claimant request the Board to affirm the ALJ's Order. The claimant further argued that the Board did not have jurisdiction to review the ALJ's award of temporary total disability and medical compensation.

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:

Ricardo Terrell worked as a delivery driver for Best Choice. His job duties consisted of receiving his daily route for delivery of Mattress Firm's products, loading the truck at the Mattress Firm warehouse and delivering mattresses, box springs, and frames. Claimant used the Best Choice truck kept in Mattress Firm's warehouse in Lenexa, Kansas. Claimant testified that he worked six days a week from Mattress Firm's warehouse location. The claimant and Best Choice worked exclusively for Mattress Firm, and Best Choice kept its trucks at the Mattress Firm's premises. The claimant testified that, on occasion, Mattress Firm employees would also make deliveries using the Best Choice trucks. The claimant earned $70 per a day or $420 per week and received this in a cash payment from Mr. Mauricio Lopez, manager at Best Choice.

On January 6, 2007, claimant injured his lower back when he was tackled by one of Mattress Firm's employees. Claimant was at the office in Mattress Firm's warehouse turning in paper work when one of Mattress Firm's employees ran up to claimant grabbed him and forced him into a wall. This incident was caught on surveillance camera. Claimant's uncontradicted testimony was that he had not engaged in any horseplay nor

had he provoked the individual in any way. This testimony was confirmed by the surveillance video.

Claimant reported the injury to Mauricio Lopez and Mike Wentworth, Mattress Firm's manager. He was advised to seek treatment by Mr. Lopez and therefore claimant sought medical treatment with a chiropractor, Dr. Andrew Bonci. Mr. Lopez paid $420 per a week for 4 weeks to the claimant while he was off work. At the time of the preliminary hearing, the claimant has not worked since his accident nor has he looked for employment.

Mauricio Lopez, manager of Best Choice, testified that Best Choice had a contract to provide deliveries for Mattress Firm. Best Choice did not provide a delivery service for any other companies. Claimant worked for Best Choice. Mr. Lopez paid the claimant approximately $10,000 and another employee $20-22,000 in 2006. He also expected to pay out more than $20,000 in 2007. Mr. Lopez admitted that he did not have worker's compensation insurance coverage when the claimant was injured but he currently has obtained coverage.

Initially, Mattress Firm argues claimant did not sustain his burden of proof that he suffered accidental injury arising out of and in the course of his employment. Claimant was pushed into a wall by an employee of Mattress firm and injured his back. Claimant described the incident as an act of horseplay. But the evidence established claimant was an unsuspecting victim and not a participant. Consequently, the accident is compensable.[1]

It was undisputed that claimant worked as a delivery driver for Best Choice. Although Mattress Firm argues claimant was an independent contractor the evidence established an employer and employee relationship existed between claimant and Best Choice. On the date of the accident claimant was performing work on a job that Best Choice had contracted to perform for Mattress Firm. Best Choice did not have workers compensation insurance coverage on the date of accident.

K.S.A. 44-503(a) extends the application of the Workmen's Compensation Act to certain individuals and entities who are not the immediate employers of an injured worker.[2] 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.[3] The statute provides:

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[1] *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, 130 P.3d 111 (2006).

[2] *Hollingsworth v. Fehrs Equip. Co.*, 240 Kan. 398, 402, 729 P.2d 1214 (1986).

[3] *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).

> 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; [4]

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.[5]

Mattress Firm sells bedding material and in its contract with Best Choice described its business as "the sale and delivery of mattresses, futons, bed frames, pillows and related merchandise."[6] The delivery of its products was at times performed by Mattress Firm employees using Best Choice's trucks. The delivery of its products to customers is an integral part of Mattress Firm's business. Because it subcontracted with Best Choice to perform the delivery work that would make claimant, an employee of Best Choice, a statutory employee of Mattress Firm.

The fact that claimant qualifies as a statutory employee of Mattress Firm is not necessarily determinative of whether Mattress Firm 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, Mattress Firm, cannot be held liable where the contractor has secured payment of compensation for which the principal would otherwise be liable.

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

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

[6] P.H. Trans., Resp. Ex. A at 1.

In this instance, Best Choice did not have workers compensation insurance on the date of 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**.[7] (Emphasis added)

Consequently, Mattress Firm, the principal in this case, is liable because the contractor, Best Choice, did not have workers compensation coverage in effect at the time of claimant's work-related accident. This Board Member affirms the ALJ's Order.

Finally, Mattress Firm argues the medical evidence did not support an award of medical compensation or temporary total disability compensation. Claimant argues that the Board does not have jurisdiction to review these issues on an appeal from a preliminary hearing. This Board Member agrees.

This is an appeal from a preliminary hearing. The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction.[8] In addition, K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. A contention that the ALJ has erred in his finding that the evidence showed a need for medical treatment is not an argument the Board has jurisdiction to consider. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment and the payment of medical compensation. Likewise, the issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). The issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[9]

Because K.S.A. 44-534a specifically grants an ALJ the authority to decide at a preliminary hearing issues concerning the payment of temporary total disability compensation and medical compensation the ALJ did not exceed his jurisdiction.

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

[8] K.S.A. 2006 Supp. 44-551(i)(2)(A)

[9] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

Accordingly, the Board does not have jurisdiction to address those issues at this juncture of the proceedings.

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.[10] 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.[11]

WHEREFORE, it is the finding of this Board Member that Mattress Firm's appeal of the ordered temporary total disability compensation and medical compensation is dismissed and the Order of Administrative Law Judge Kenneth J. Hursh dated April 12, 2007, is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2007.

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BOARD MEMBER

c: Michael J. Joshi, Attorney for Claimant
Mark E. Kolich, Attorney for Best Choice Delivery Service
J. Sean Dumm, Attorney for Mattress Firm & Twin City Fire Ins. Co.
Derek Chappell, Attorney for Fund
Kenneth J. Hursh, Administrative Law Judge

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[10] K.S.A. 44-534a.

[11] K.S.A. 2006 Supp. 44-555c(k).