

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

<b>BRYAN S. CALLOW</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,821
<b>ALL AMERICAN CONSTRUCTION</b>	)	
Respondent	)	
AND	)	
	)	
<b>INSURANCE COMPANY UNKNOWN</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant appeals the January 26, 2010, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was denied workers compensation benefits after the ALJ determined that respondent did not have a payroll sufficient to cause this accident to come under the Kansas Workers Compensation Act (Act).

Claimant appeared by his attorney, Joseph Seiwert of Wichita, Kansas. Respondent appeared by William J. Pittman.<sup>1</sup> The Kansas Workers Compensation Fund (Fund) appeared by its attorney, John C. Nodgaard of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held December 22, 2009, with attachments; and the documents filed of record in this matter.

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<sup>1</sup> Mr. Pittman is the owner of All American Construction (respondent) and appeared pro se.

**ISSUE**

Did respondent have a total gross annual payroll for the preceding calendar year of more than \$20,000.00, or will respondent have a reasonably estimated total gross annual payroll for the current year of more than \$20,000.00?

**FINDINGS OF FACT**

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was a laborer for a roofing company identified as All American Construction. Respondent company was owned jointly by William J. Pittman and Kevin Pint. Mr. Pittman was the holder of a class B construction/business license. Mr. Pint was desirous of joining with Mr. Pittman to do a roofing job in Wichita, Kansas at 2121 East Bluff Street. This job was the first such business transaction between these two under the name of All American Construction. They did anticipate obtaining other jobs in the future, but no bids or contracts had been entered into as of the time of the preliminary hearing.

Claimant was actually hired by his neighbor, "Jose",<sup>2</sup> a roofer who had a crew. "Jose" was hired by Mr. Pint to perform the strip off and reapplication of the roof at the above address. Claimant was hired by "Jose" at \$8.00 per hour for an anticipated 40-hour week, to work for All American Construction. Claimant testified that Mr. Pint was at the house giving instructions for the job. However, "Jose" was the one who actually hired and supervised claimant. "Jose", being claimant's neighbor, would pick claimant up and drive him to and from the job. On the third day, which was September 18, 2009, claimant fell off the roof, breaking his right arm and left leg. Claimant underwent surgery on his left ankle, with several pins being inserted.

Mr. Pitman testified at the preliminary hearing about the relationship between him and Mr. Pint. Mr. Pittman had the proper license, and Mr. Pint had the job. They decided to join forces in order to do the roofing job and make some money. However, after claimant fell off the roof, and they were paid, Mr. Pint left with the money and Mr. Pitman was left with nothing. Additionally, claimant was paid nothing for his three days labor and none of the medical bills from the accident were paid. Mr. Pittman did testify that Mr. Pint gave him some money to buy insurance, but on cross-examination, it was determined that the insurance was general liability insurance and not workers compensation insurance. It was apparent, from his testimony, that Mr. Pittman had no money with which to pay any of claimant's bills. There is also no information in this record regarding the financial status of "Jose" or whether he had any workers compensation insurance. Additionally, "Jose" and

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<sup>2</sup> Jose's last name is possibly Santacruz, but that is not certain. (See P.H. Trans. at 30.)

his other two employees were being paid by Mr. Pittman and Mr. Pint as employees of All American Construction.

Mr. Pittman was asked whether respondent company had an anticipated payroll for the current year of \$20,000.00 or more, and he stated no. As noted above, there was no payroll for the preceding year as the company was only recently formed. While there was anticipation of additional jobs for 2009, the company had not bid any jobs and had not entered into any contracts for future work.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>3</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>4</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>5</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>6</sup>

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<sup>3</sup> K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

<sup>4</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>5</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>6</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

K.S.A. 44-505(a)(2)(3) states:

(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:

...  
(2) 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;

(3) 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 has not had a payroll for a calendar year 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 a part of the total gross annual payroll of such employer for purposes of this subsection;

....

As noted above, respondent was newly formed and had no payroll for the preceding year. Additionally, the current year's payroll encompassed only the money due for the current job, which only lasted a few days. Mr. Pittman testified that the contract for the job was \$7,000.00, of which half was for materials. Therefore, only approximately \$3,500.00 was left for payroll. Additionally, respondent had bid no other jobs and had not entered into any other contracts for work for the current year. Mr. Pittman testified that respondent would not have a total gross annual payroll of more than \$20,000.00. The determination by the ALJ that respondent, All American Construction, would not have a payroll sufficient to come under the Act is supported by this record and is affirmed.

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. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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

**CONCLUSIONS**

Respondent company does not have a payroll sufficient to come under the Kansas Workers Compensation Act. The denial of workers compensation benefits to claimant is affirmed.

**DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated January 26, 2010, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 2010.

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HONORABLE GARY M. KORTE

c: Joseph Seiwert, Attorney for Claimant  
William J. Pittman, All American Construction, 5401 East Funston Street, Wichita,  
Kansas 67218-4513, Respondent  
John C. Nodgaard, Attorney for the Fund  
John D. Clark, Administrative Law Judge