BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD NAGEL Claimant	)	
VS.	)	
NOBLE PETROLEUM, INC. Respondent	)	Docket No. 1,059,495
AND	)	
PRAETORIAN INSURANCE COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 27, 2013, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Joseph Seiwert of Wichita, Kansas, appeared for claimant. Vincent Burnett of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found claimant failed to establish the relationship of employer and employee existed on the date of the accident; therefore, claimant's requests for temporary total disability and payment of medical bills were denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 8, 2012, Preliminary Hearing and the exhibits; and the deposition of Marion Lynn Marvin taken March 12, 2012, and the exhibit, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues he was an employee of Marvin's Welding and not an independent contractor. Further, claimant contends he was a statutory employee of respondent under K.S.A. 44-503(a) due to the principal-subcontractor relationship between respondent and Marvin's Welding and is eligible for all benefits.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues claimant failed to prove his status as a statutory employee.

The sole issue for the Board's review is: Did the relationship between employer and employee exist at the time of claimant's January 9, 2012 injury?

FINDINGS OF FACT

Claimant was hired as a day laborer by Marion Lynn Marvin, owner and operator of Marvin's Welding, on January 2, 2012. Claimant assisted Mr. Marvin in maintenance and mechanical work on pumping units for various companies, including respondent.

On January 9, 2012, claimant was assisting Mr. Marvin to install wrist pins on a pumping unit. After completing work on one side of the unit, claimant attempted to continue threading a nut Mr. Marvin had started. When claimant turned to retrieve thread treatment, "[he did not] know if the auto crane slipped that [they] had it hooked onto or what, but all the pressure snapped back and it caught [his right small] finger between the back of the weight and that wrist pin nut."[1]

Immediately afterward, claimant wrapped his finger and applied pressure and elevation. Claimant stated they remained at the job site for approximately two and one-half additional hours. Mr. Marvin completed the job alone before taking claimant home.

After returning home, claimant went to the Susan B. Allen Memorial Hospital emergency room to obtain treatment on his finger. Claimant presented with a degloving/crush injury to the small digit of his right hand. Claimant was discharged that evening with instruction to return for surgery the next day. He was given medication and his finger was dressed.

On January 10, 2012, claimant underwent surgery with Dr. Gerard Librodo of Susan B. Allen Memorial Hospital. Claimant was diagnosed with a crushing injury, a nail bed injury, and an open fracture of the distal phalanx of his right small finger. Dr. Librodo amputated the distal phalanx of claimant's right small finger and directed claimant to return for follow-up care. Claimant testified he returned approximately twice for removal of his sutures, which required removal in stages.

Claimant documented his insurance as "self pay" while receiving medical treatment.[2] Claimant testified he did not believe Mr. Marvin had workers compensation insurance. When he spoke with Mr. Marvin regarding the accident and the incurred medical bills,

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[1] P.H. Trans. at 11.

[2] P.H. Trans., Ex. 1 at 2.

claimant stated Mr. Marvin "basically said there wasn't [anything] he could do about it."[3] Claimant did not return to work for Marvin's Welding.

Claimant testified Mr. Marvin directed him as to what hours he would work each day. Further, claimant stated Mr. Marvin owned a work truck and tools which he provided for claimant's use while on the job. Mr. Marvin testified he provided transportation to and from the work site because claimant "was down on his luck. He didn't have his truck running, and [Mr. Marvin] was trying to help him out."[4]

Claimant was paid by the hour and completed a full 40-hour work week from the time he was hired by Mr. Marvin until the time of the accident. Claimant worked an additional 11 hours the day of his accident. Although Mr. Marvin offered to pay claimant on a daily basis, claimant preferred to receive payment at the end of each week. Claimant was paid by check. Mr. Marvin stated he planned to give claimant a Form 1099 at the end of the year for tax purposes since he treated claimant as an independent contractor.

At the time of the accident, claimant and Mr. Marvin were working on respondent's lease. Respondent paid Marvin's Welding at an hourly rate for basic repair work. Mr. Marvin testified he would submit an itemized invoice to respondent for payment when the work completed. Mr. Marvin was never on respondent's payroll. Respondent did not provide tools for Marvin's Welding nor supervise Marvin's Welding. Further, Mr. Marvin stated respondent hired other companies in addition to Marvin's Welding to perform maintenance and repair work. Claimant never had direct communication or dealings with respondent.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-503(a) states in part:

> 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; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of

[3] P.H. Trans. at 16.

[4] Marvin Depo. at 10.

> compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

The Kansas Supreme Court set forth a test to determine if work is part of a principal's trade or business: (1) is the work by the independent contractor and the injured employee necessarily inherent in and an integral part of the principal's trade or business? (2) is the work by the independent contractor and the injured employee such as would ordinarily have been done by the employees of the principal?[7] If either of the questions contained in the *Hanna* test is answered in the affirmative, the work being done is part of the principal's "trade or business," and the injured employee's sole remedy against the principal is under the Act.[8]

In *Bright*, Cargill was seeking protection from civil liability by claiming that Mr. Bright was a statutory employee. Citing Larson, the Court stated:

> [T]he *test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business*, since, after all, this could be said of practically any repair, construction or transportation service. The test (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether this indispensable activity is, in that business, normally carried on through employees rather than independent contractors. (Emphasis added.)[9]

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[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2012 Supp. 44-555c(k).

[7] *Hanna v. CRA, Inc.*, 196 Kan. 156, 159-60, 409 P.2d 786 (1966).

[8] *Bright v. Cargill, Inc.*, 251 Kan. 387, 837 P.2d 348 (1992).

[9] 251 Kan. at 398, citing 1C Larson, *Workmen's Compensation Law* § 49.16(j), pp. 9-105 – 9-106 (1991).

The Court in *Bright* went on to apply the *Hanna* test. First, to determine whether the work is inherent in and an integral part of the principal's trade or business, the *Bright* Court found that replacing a piece of equipment was not an inherent and an integral part of Cargill's trade. The Court stated that Cargill showed only that "the C-house leg drive was a necessary and integral piece of equipment which had to be replaced."[10]

Like the facts in *Bright,* the pumping units are necessary and integral pieces of equipment. In *Bright*, Cargill could not house grain in the elevator without the C-house drive. In this case, the respondent cannot get oil out of the ground without the pumping units. As applied to the record in this case, the first question of the *Hanna* test is answered in the negative. While the pumping units are necessary pieces of equipment, maintenance and repair of the pumping units is not necessarily inherent in and an integral part of the principal's trade or business.

The second part of the *Hanna* test asks: would respondent or similar businesses have ordinarily performed the work themselves? The only evidence in the record is that the respondent and similar businesses do not perform pumping unit maintenance themselves. Mr. Marvin testified that respondent and companies similar to respondent did not do their own maintenance and repairs.[11] This evidence is uncontroverted.

In *Bright*, the Court found that the work performed by the company for whom Mr. Bright worked was not work that Cargill or similar businesses would do themselves. The evidence in this case supports a finding that respondent and similar businesses use outside contractors to perform maintenance and repairs on pumping units.

Because the facts support a finding that neither of the *Hanna* test's two questions are answered in the affirmative, this Board Member must find the work that caused claimant's injury was not part of the principal's "trade or business," and claimant's accidental injury is not covered by the Act.

CONCLUSION

At this point of the proceeding, claimant has failed to prove that a relationship between employer and employee existed at the time of claimant's January 9, 2012 injury.

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[10] 251 Kan. at 399.

[11] Marvin Depo. at 14.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 27, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2013.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Nelsonna Potts Barnes, Administrative Law Judge