

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

ADOLFO CASTILLO-CHAVEZ)
Claimant)
)
VS.)
)
AMMEX MASONRY, INC., and)
HUTTON CONSTRUCTION CORP.)
Respondents)
)
AND)
)
PINNACOL ASSURANCE, and)
HARTFORD INSURANCE COMPANY)
Insurance Carriers)

Docket No. 1,062,121

ORDER

STATEMENT OF THE CASE

Insurance carrier Pinnacol Assurance (Pinnacol) and respondent Ammex Masonry, Inc., (Ammex) requested review of the March 11, 2013, preliminary hearing Order for Compensation entered by Administrative Law Judge (ALJ) Pamela J. Fuller. C. Albert Herdoiza, of Kansas City, Kansas, appeared for claimant. L. Anne Wickliffe, of Kansas City, Missouri, appeared for Pinnacol. Kim R. Martens, of Wichita, Kansas, appeared for respondent Ammex. Donald J. Fritschie, of Overland Park, Kansas, appeared for respondent, Hutton Construction Corp. (Hutton), and its insurance carrier, Hartford Insurance Company (Hartford).

The ALJ granted claimant's request for temporary total disability compensation beginning July 28, 2012, through November 27, 2012, less amounts already paid. The temporary total disability compensation was ordered to be paid by respondent Ammex and its insurance carrier, Pinnacol.

The record on appeal is the same as that set out in the March 11, 2013, Order for Compensation.

ISSUES

Insurance carrier Pinnacol contends the ALJ's order should be reversed to the extent it finds the court has jurisdiction over Pinnacol in this action and to the extent Pinnacol is ordered to pay medical expenses and other benefits to claimant, arguing it's contract for insurance was exclusive to injuries occurring in the State of Colorado and not subject to the jurisdiction of the Kansas Workers Compensation Division.

Respondent Ammex asks the Board to affirm the portion of the ALJ's Order for Compensation finding the court had jurisdiction over Pinnacol. Ammex requests review of the ALJ's finding that claimant's injury by accident arose out of and in the course of his employment. Ammex also argues that claimant is not entitled to workers compensation benefits because his injury was the result of his reckless violation of the employer's workplace safety rules and regulations.

Claimant argues that Ammex's position that claimant's actions were a violation of its safety policies has no basis and that claimant's testimony concerning the mechanism of injury is uncontroverted. Claimant further argues that if Ammex did not have workers compensation coverage in Kansas at the time of claimant's accident, the general contractor, Hutton, and its insurance carrier, Hartford, would be responsible for payment of claimant's medical expenses and temporary total disability compensation, as well as ongoing medical treatment. Claimant asks that the Board affirm the ALJ's Order for Compensation and affirm that claimant is entitled to continuing benefits pursuant to the provisions of the Kansas Workers Compensation Act.

Respondent Hutton and its insurance carrier, Hartford, join with Ammex in its compensability arguments. Further, Hutton and Hartford argue that the ALJ had personal jurisdiction over Pinnacol and the Board should affirm the ALJ's determination that Pinnacol subjected itself to personal jurisdiction in the State of Kansas.

The issues for the Board's review are:

1. Did claimant's injury result from the reckless violation of a workplace safety rule and regulation so as to deny workers compensation compensability?
2. Did the ALJ have personal jurisdiction over Pinnacol? Does the Board have jurisdiction over this issue in an appeal from a preliminary hearing order?

FINDINGS OF FACT

Claimant was injured while working for Ammex in Dodge City, Kansas, on July 26, 2012. Ammex is a Colorado company. Ammex was a subcontractor on a project to build a school building in Dodge City, Kansas. It was Ammex's first job outside the state of Colorado. Hutton was the general contractor. Hutton's contract with Ammex required

Ammex to have various levels of insurance, including “Workers Compensation per statutory requirements.”¹

Jaime Alvarez, Ammex’s president, told his project assistant, Amy Wheeler, to be sure Ammex would be covered by insurance for the work performed in Kansas. Ammex had its workers compensation insurance, as well as other insurance coverage, with Pinnacol. Ammex’s insurance agent was Nick Vuolo with Network Insurance (Network). Ms. Wheeler sent an email to Network asking for a certificate of insurance, and received an email back from Network stating: “Everything looks good! You’re in great shape!”² Ammex later received a Certificate of Liability Insurance signed by Mr. Vuolo. The certificate stated:

This is to certify that the policies of insurance listed below have been issued to the insured named above [Ammex] for the policy period indicated. Notwithstanding any requirement, term or condition of any contract or other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies.³

The certificate indicates Ammex’s coverage included general liability, automobile liability and workers compensation and employer’s liability insurance. The terms of the insurance policy set out, on its Policy Information Page dated May 1, 2012:

A. Workers’ Compensation Insurance: Part One of the policy applies to the workers’ compensation law of the states listed here: COLORADO.

.....

C. Other States Insurance: Part Three of the policy applies to the states, if any, listed here: NONE (Please contact Pinnacol Assurance for information on coverage outside the state of Colorado).⁴

Ammex’s policy with Pinnacol also included a “Limited Coverage Endorsement for Other State Benefits,” which stated:

This endorsement is part of the above policy and is subject to the terms and provisions of that policy. Nothing in this endorsement changes or eliminates your

¹ Exhibits Referenced in Depositions of Adolfo Castillo-Chavez, Jaime Alvarez, Miguel Terrazas, Hutton Ex. 1 at 4.

² Alvarez Depo. at 39.

³ Exhibits Referenced in Depositions of Adolfo Castillo-Chavez, Jaime Alvarez, Miguel Terrazas, Ammex Ex. 7 at 3; Hutton Ex. 1 at 1.

⁴ *Id.*, Resp. Ex. 2 at 2.

obligation under the policy. Pinnacol Assurance is not licensed as an insurer in any state other than Colorado. As such, Pinnacol Assurance will not pay benefits to insured workers for claims filed in other states. However, Pinnacol Assurance will indemnify you for benefits that you have paid under the following conditions:

1. The employee claiming benefits was hired in Colorado and was at the time of the injury principally employed in Colorado;

.....

If you hire any employee outside of Colorado or begin operations in any other state, you should do whatever may be required under that state's law, as this endorsement does not satisfy the requirements of that state's workers' compensation law.⁵

Jesus Delgado was the foreman on the Kansas project. Most of the employees on the job were Ammex employees from Colorado. Sometime the end of January or first of February 2012, claimant showed up at the job site asking about work. Mr. Delgado hired claimant on February 2, 2012, as a laborer. Claimant's first duties were to pick up debris and scrape walls. After working awhile, claimant was asked to perform other duties, including climbing on the scaffolding and distributing mix to other employees and taking down the wooden walking planks.

On July 26, 2012, claimant was on the top platform of the scaffold. He was instructed to remove the wooden planks forming the walking plank, which he testified was about 12 to 18 inches below the top platform. The walking plank stood out beyond the platform and consisted of two wooden planks lying atop outriggers. Claimant testified he stepped down off the top platform onto the walking plank, the walking plank flipped up and he fell. Claimant said as he fell, he hit the wall of the building and landed straddling an outrigger. Claimant said the wooden plank was supposed to have a "hook" to support the plank, but the hook was missing, causing the wooden plank to flip. Claimant suffered urethral trauma and had pain in his genitals and perineum. He was taken to the emergency room at the hospital in Dodge City and was later air-flighted to Wichita.

Claimant admitted he had stepped down from the top platform onto the wooden plank five or six times before the accident. He stated he had never been reprimanded or told he was doing something unsafe. Claimant said the rules of being on the scaffolding were never explained to him. He had attended a safety meeting where rules about climbing ladders were discussed, but not the rules of being on the scaffolding. Claimant testified it was not his intention to violate a safety regulation or one of Ammex's rules. Nor was it his intention to do anything that would endanger him or put his life at risk.

⁵ *Id.*, Resp. Ex. 1.

Mr. Alvarez testified that OSHA policy is that no one is allowed to climb on the frames or cross braces of scaffolding. Anyone seen climbing the scaffolding not using a ladder would get a verbal warning and a written notice that the conduct was not permissible. Mr. Alvarez said the safety policy prohibiting employees from traversing a scaffold using the framing as opposed to the ladder was communicated to the employees by the foreman, Mr. Delgado. Mr. Delgado testified he held a safety meeting every Wednesday after lunch and would discuss different topics relating to the work being done that day, including the rules concerning ladders and scaffolds. He said claimant attended every meeting after being hired. Mr. Delgado would have each employee sign a sheet of paper indicating they had been in attendance at the safety meeting. Mr. Delgado referenced three of those signature sheets which showed claimant attended a meeting on February 3, 2012, concerning scaffolds; a meeting on February 10, 2012, on ladders; and a meeting on February 18, 2012, on guard rails.⁶ It was noted that February 3 and 10, 2012, were Saturdays and February 18, 2012, was a Sunday. Mr. Delgado admitted the dates of the meetings might be wrong or that he might have had a meeting on a Saturday, but the topics were correct and all three signature sheets include claimant's signature as having attended.

Mr. Delgado has a copy of an employee manual, which is in English, that includes Ammex's safety regulations. He said he goes over those regulations in the Wednesday meetings. He also said he had safety manuals from OSHA that he would translate into Spanish for the employees for whom Spanish was their first language. At times he would read the specific details of the OSHA safety rules and at other times he would use his own training and experience in talking about safety. Mr. Delgado said he personally communicated to claimant that he was to use the ladder when coming down the scaffold and that he was not to crawl down the scaffold frame. Mr. Delgado was under the impression that claimant climbed down the scaffold frame rather than stepping down from the top platform onto the walking plank, as was claimant's testimony.

The ALJ found that claimant met with personal injury arising out of and in the course of his employment with Ammex and that there was a causal connection between the conditions under which the work was required to be performed and the accident. The ALJ found the work accident to be the prevailing factor causing claimant's injuries. The ALJ further found that the Kansas Division of Workers Compensation had personal jurisdiction over Pinnacol and found it to be liable for all expenses incurred for claimant's accidental injury of July 26, 2012.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b states in part:

⁶ *Id.*, Ammex Ex. 3.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 44-503 states in part:

(a) 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 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.

....

(g) Notwithstanding any other provision of this section, in any case where the contractor (1) is an employer who employs employees in an employment to which the act is applicable, or has filed a written statement of election with the director to accept the provisions of the workers compensation act pursuant to subsection (b) of K.S.A. 44-505, and amendments thereto, to the extent of such election, and (2) has secured the payment of compensation as required by K.S.A. 44-532, and amendments thereto, for all persons for whom the contractor is required to or elects to secure such compensation, as evidenced by a current certificate of workers compensation insurance, by a certification from the director that the contractor is currently qualified as a self-insurer under that statute, or by a certification from the commissioner of insurance that the contractor is maintaining a membership in a qualified group-funded workers compensation pool, then, 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. 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. No insurance company shall charge a principal a premium for workers compensation insurance for any liability for which the contractor has secured the payment of compensation.

K.S.A. 2012 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

....

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

....

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

....

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) “Burden of proof” means the burden of a party to persuade the trier of facts 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 unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-501(a) states in part:

(1) Compensation for an injury shall be disallowed if such injury to the employee results from:

... .

(D) the employee’s reckless violation of their employer’s workplace safety rules or regulations.

ANALYSIS

1. Reckless Violation of Workplace Safety Rule

In order to prevail on appeal, respondent must show that claimant’s injuries resulted from the reckless violation of one or more of respondent’s workplace safety rules or regulations. There is no definition of “reckless” in the Workers Compensation Act. The definition of “reckless” in a civil claim was discussed at length by the Kansas Supreme Court in *Hoard v. Shawnee Mission Medical Center*,⁷ where it quoted the Restatement (Second) of Torts § 500 comment a (1963):

Types of reckless conduct. Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.

For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. . . .

For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible

⁷ *Hoard v. Shawnee Mission Medical Center*, 233 Kan. 267, 662 P.2d 1214 (1983), citing *Wiehe v. Kukul*, 225 Kan. 478, 483-84, 592 P.2d 860 (1979).

danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence.⁸

After reviewing other definitions of “reckless,” the court in *Wiehe* concluded:

Thus we see that recklessness requires knowledge. The person who is reckless must have prior knowledge; he must know or have reason to know of facts which create a high degree of risk of harm to another, and then, indifferent to what harm may result, proceed to act.⁹

K.S.A. 2012 Supp. 21-5202, which applies to criminal conduct states, in part:

(j) A person acts “recklessly” or is “reckless,” when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

This Board member agrees with the ALJ that claimant did not know he was violating a safety rule or regulation and finds claimant's violation of Ammex's workplace safety rules or regulations did not rise to the level of recklessness. Respondents did not prove recklessness under K.S.A. 2012 Supp. 44-501(a)(1)(D).

2. Jurisdiction of ALJ over Pinnacol

The second issue in this case is whether the ALJ has jurisdiction to order Pinnacol to provide coverage. K.S.A. 2012 Supp. 44-534a grants authority to an Administrative Law Judge to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation. K.S.A. 2012 Supp. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accident, repetitive trauma or resulting injury
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given; and
- (4) Whether certain defenses apply.

⁸ *Id.* at 280-81.

⁹ *Wiehe v. Kukal*, 225 Kan. at 484.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an administrative law judge if it is alleged the administrative law judge exceeded his or her jurisdiction in granting or denying the relief requested.¹⁰ In this case it is alleged that the ALJ exceeded her jurisdiction in assessing liability against Pinnacol.

The ALJ ordered Ammex and Pinnacol, a carrier based in Colorado, to provide coverage for an injury occurring in Dodge City, Kansas. The ALJ relied on a certificate of coverage provided by Ammex's insurance agent to Hutton, the general contractor, which stated Ammex had coverage for the project. The certificate identified the name of the general contractor and the construction project, but not the location of the project.

Pinnacol is not registered to do business in Kansas. A copy of the policy shows that the coverage was restricted to Colorado. The policy specifically noted it did not provide coverage in any state other than Colorado. The certificate specifically states it was for informational purposes and did not "amend, extend or alter the coverage afforded by the policies."¹¹

The facts in this case are practically identical to the facts in *Johnson v. United Excel Corp.*,¹² an unpublished opinion from the Kansas Court of Appeals. The court in *Johnson* reversed a Board finding that held an insurance carrier liable even though the insurance policy and certificate of insurance limited the coverage to Nebraska employees.

K.S.A. 44-503(g) declares that the principal is liable if a subcontractor fails to secure payment of compensation or if compensation is otherwise unavailable or if compensation is not in effect. In *Johnson*, the court found the restricted coverage equated to a failure to obtain coverage, currently required by K.S.A. 2012 Supp. 44-532(b).

In this case, the Pinnacol policy covered only Colorado claims. The policy of insurance clearly showed that no other states were included in the coverage. As such, based upon the guidance provided in *Johnson*, the subcontractor has failed to provide coverage, making the principal, Hutton, and its insurance carrier, Hartford, liable pursuant to K.S.A. 44-503(a).

¹⁰ See K.S.A. 44-551.

¹¹ Exhibits Referenced in Depositions of Adolfo Castillo-Chavez, Jaime Alvarez, Miguel Terrazas, Ammex Ex. 7 at 3; Hutton Ex. 1 at 1.

¹² *Johnson v. United Excel Corp.*, No. 99,428, 200 P.3d 38 (Kansas Court of Appeals unpublished opinion filed Jan. 30, 2009) *rev. denied* 289 Kan. 1279 (2009).

CONCLUSION

Based upon the foregoing, this Board member finds:

1. Claimant suffered an injury arising out of his employment on July 26, 2012;
2. Respondents failed to sustain the burden of proving that claimant's injury resulted from the reckless violation of a workplace safety rule or regulation;
3. Ammex failed to procure workers compensation coverage pursuant to K.S.A. 2012 Supp. 44-532; and
4. Hutton and its insurance carrier, Hartford, are liable to provide compensation pursuant to K.S.A. 44-503(a).

ORDER

WHEREFORE, the Order of Compensation entered by Administrative Law Judge Pamela J. Fuller dated March 11, 2013, is modified to reflect that the responsible parties are Hutton Construction Corp. and its insurance carrier, Hartford Insurance Company. All other aspects of the order are affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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