

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

VICKI S. MORAN)
Claimant)
)
VS.)
)
ARNOLD & ASSOC. OF WICHITA)
Respondent)
and)
ZURICH AMERICAN INSURANCE CO.)
Insurance Carrier)
)
AND)
)
DILLON COMPANIES, INC.)
Self-Insured Respondent)

Docket No. **1,064,968**

ORDER

Arnold & Associates of Wichita and its insurance carrier (respondent) request review of the June 7, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. James B. Zongker, of Wichita, Kansas, appeared for claimant. Julie A. N. Sample, of Overland Park, Kansas, appeared for respondent. Edward D. Heath, Jr., of Wichita, Kansas, appeared for Dillon Companies, Inc. (hereinafter Dillon), a self-insured employer.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibit, dated June 6, 2013, and all pleadings contained in the administrative file.

The ALJ found:

The central issue in this case is a determination of the going and coming rule. The claimant fell in a parking lot controlled by Dillons, with whom the claimant, through the Arnold group was employed. She was told where to park. Relying on the *Butera* case, the court finds that these circumstances represent an exception to the coming and going rule, and that Respondent the Arnold group and its carrier are responsible for the coverage on this claim as well as the costs of the court reporter. The court designates Dr. Lucas as the authorized treating physician for the

claimant's knee. The court further orders the respondent the Arnold Group to provide the claimant with a list of two qualified physicians from which the claimant may choose an authorized physician for the claimant's other injuries.

ISSUES

Respondent maintains the ALJ erred in finding claimant sustained her evidentiary burden with respect to the going and coming rule embodied in K.S.A. 2012 Supp. 44-508(f)(3)(B).

Claimant argues the ALJ's Order should be affirmed.

Dillon Companies argues that the liability for claimant's benefits should be assessed against respondent.

The sole issue raised on review is: Did claimant's accidental injury arise out of and in the course of her employment with respect to the going and coming rule in K.S.A. 2012 Supp. 44-508(f)(3)(B)?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Vicki Moran commenced employment with respondent, a temporary work agency, on February 9, 2012. In September 2012, claimant was sent by respondent to a Dillon Companies distribution center to perform an audit.¹ The audit was to be completed on February 28, 2013.²

Claimant was assigned a specific parking place in the parking lot of the distribution center. Claimant, the only witness at the preliminary hearing, testified on direct examination that respondent told her where to park.³ On cross-examination, claimant testified that Dillon Companies directed her where to park.⁴ Claimant testified she was employed by respondent.⁵ After her placement to perform the audit, Dillon Companies told

¹ The specific nature of the auditing work is not in the record.

² P.H. Trans. at 13.

³ *Id.* at 8.

⁴ *Id.* at 12.

⁵ *Id.* at 7.

claimant the location within the distribution center where she was to perform her work. There is no evidence claimant was directly employed by Dillon Companies. The parking lot where claimant fell was owned by Dillon Companies.

On her way to work on February 27, 2013, claimant sustained injuries when she slipped and fell on snow and ice in the parking lot of the distribution center.

Respondent argues that it neither owned nor exclusively controlled the parking lot where claimant was injured and that claimant's claim against respondent is accordingly barred by the going and coming rule.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-508(f)(3)(B) states:

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2012 Supp. 44-503 provides in relevant 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.

(c) Nothing in this section shall be construed as preventing a worker from recovering compensation under the workers compensation act from the contractor instead of the principal.

(d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under the principal's control or management, or on, in or about the execution of such work under the principal's control or management.

(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.

ANALYSIS

Judge Klein correctly found that the premises exception to the going and coming rule is applicable in this claim and that respondent is obliged to provide claimant the compensation required by the Act.

There is no dispute claimant was employed by respondent when the accidental injury occurred. However, respondent maintains the claim is barred by the version of the going and coming rule in effect when the accident occurred, and that the premises exception is inapplicable because respondent neither owns nor exercises exclusive control over the parking lot where claimant fell. The evidence is undisputed that Dillon Companies owned the distribution center where claimant was injured. It seems highly unlikely that Dillon Companies would have relinquished any control over the facility it owned and operated to another entity. It is a reasonable inference from the evidence that respondent exercised no control over the property and that Dillon Companies exercised exclusive control.

Respondent is claimant's direct employer and Dillon Companies is a "special employer." In *Bright*,⁶ the Kansas Supreme Court held: "A worker may be the employee of two employers, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." In *Scott*,⁷ the Kansas Supreme Court held: "The term 'special employee' refers to a lent employee. A special employee becomes the servant of the special employer and assumes the same position as a regular employee for purposes of the Workers Compensation Act."

Dillon Companies is also a principal or "statutory employer," pursuant to K.S.A. 2012 Supp. 44-503, and could therefore be liable to compensate claimant as a "statutory employee." Respondent is the "contractor." Under that provision, claimant is allowed to "skip" his direct employer (respondent) and claim workers compensation benefits from the statutory employer/principal (Dillon Companies) if the direct employer has not secured workers compensation coverage via insurance or another method approved under the Act.

In *Butera*,⁸ the claimant was employed by Fluor Daniel Construction (the direct employer/contractor), which had contracted to provide fueling services at a power plant owned and operated by Wolf Creek (the statutory employer/principal). The claimant was injured on the premises of Wolf Creek while on the way to work. The Court of Appeals held that the term "employer" within the meaning of the premises exception to the going and coming rule, then embodied in K.S.A. 44-508(f), was not limited to the contractor/direct employer, but also included the principal/statutory employer. Accordingly, the Court of Appeals held that Mr. Butera's accident fell within the premises exception to the going and coming rule because he was injured on the principal's premises.

In this claim, the status of Dillon Companies as either a special employer or a statutory employer does not relieve respondent of responsibility to pay the compensation due claimant under the Act. If Dillon Companies is a special employer, then both Dillon Companies and respondent are considered employers—Dillon Companies as a special employer and respondent as an employer in the traditional sense,⁹ a relationship which respondent does not deny. Respondent's status as a direct employer is unaltered by Dillon Companies equivalent status as a special employer. If Dillon Companies is a statutory employer under K.S.A. 2012 Supp. 44-503, it cannot be liable in this claim because under

⁶ *Bright v. Cargill, Inc.*, 251 Kan. 387, 837 P.2d 384 (1992).

⁷ *Scott v. Altmar, Inc.*, 272 Kan. 1280, 38 P.3d 673 (2002).

⁸ *Butera v. Fluor Daniel Construction Corp.*, 31 Kan. App. 2d 108, 61 P.3d 95 (2003).

⁹ For a discussion of the nature of the employment relationship, see *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984); *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

44-503(g), the principal may not be held liable when the contractor has workers compensation coverage. There is no dispute that respondent had such coverage.

The rationale for the going and coming rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.¹⁰

Respondent argues that the amendment of the premises exception to the going and coming rule in the 2011 revisions to the Act invalidates the holding of the Court of Appeals in *Butera*. The undersigned Board Member disagrees.

With respect to the premises exception to the going and coming rule, the 2011 amendments changed the phrase “premises of the employer” to “premises owned or under the exclusive control of the employer.” This amendment to the premises exception serves to more clearly define, and arguably limits, what is and is not on the “premises” of the employer. However, the new definition does not impact the holding in *Butera* for the following reasons:

1. The sole issue in *Butera* was whether the term “employer” as used in K.S.A. 2001 Supp. 44-508(f) is limited to the direct employer and does not include the statutory employer. The *Butera* decision was not based in the meaning of the word “premises.” The bases for the Court’s construction of the word “employer” were: a) the provision in K.S.A. 2001 Supp. 44-501 (g) [the current provision is in K.S.A. 2012 Supp. 44-501b(a)] that it is the intent of the legislature that the Act be liberally construed for the purpose of bringing employers and employees within the provisions and protections of the Act, and b) one of the primary purposes of the Act is to burden industry with the economic loss to an employee resulting from work-related injuries.¹¹

2. There is nothing in the 2011 amendment to the premises exception that supports the notion that the legislature intended to change the definition of “employer” as used in the premises exception.

3. Respondent’s interpretation of the 2011 amendment to the premises exception is that claimant’s direct employer cannot be liable in this claim because respondent neither owned nor exclusively controlled the parking lot where claimant was injured. That interpretation would result in the premises exception being virtually never applicable when the employer is a temporary job service. The very nature of temporary job services is to send their employees to other business entities to work. There is no basis on which to

¹⁰ *Thompson v. Law Office of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

¹¹ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011); *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

conclude the legislature intended such a result. If the legislature intended to alter the premises exception for temporary staffing services, it could easily have enacted express language to accomplish that end, as it previously did for providers of emergency services responding to emergencies.

In general, statutes should be construed to avoid unreasonable results.¹² In *Todd*, the Kansas Supreme Court held that “the legislature is presumed to intend that a statute be given a reasonable construction, so as to avoid unreasonable or absurd results.”¹³

4. If respondent’s position were adopted, it would do nothing to advance the purpose of the going and coming rule.

In a factual scenario analogous to this claim, a Board Member was faced with an argument very similar to respondent’s contention in this claim. *Harris*,¹⁴ involved a claim governed by the New Act amendments. Ms. Harris was employed by a staffing agency, Comfort Keepers, which had assigned Ms. Harris to work as a CNA at Overland Park Place (OPP). Although OPP controlled the premises where it operated, the premises was owned by another entity, FSQ Overland Park Place Business Trust (FSQ). The evidence did not establish the relationship between OPP and FSQ. Ms. Harris was injured when she fell while she was descending the front steps of OPP on the way to her car after her shift ended. Ms. Harris pursued a claim against Comfort Keepers. The Board Member who decided *Harris* found Ms. Harris’ accidental injury arose out and in the course of her employment with Comfort Keepers. He commented:

At the time of her accidental injury, claimant was employed by respondent, a staffing agency. She had been placed by that staffing agency at OPP and worked there on a regular basis. OPP stood in the shoes of claimant’s employer such that the premises of OPP constituted the premises of claimant’s employer for the purposes of K.S.A. 2011 Supp. 44-508(f)(3)(B).¹⁵

CONCLUSION

This Board Member finds the ALJ correctly found that claimant’s claim for compensation against respondent is not barred by the going and coming rule. The

¹² *Hawley v. Kansas Dept. of Agriculture*, 281 Kan. 603, 631, 132 P.3d 870 (2006).

¹³ *Todd v. Kelly*, 251 Kan. 512, 520, 837 P.2d 381 (1992). See also *League of Kansas Municipalities v. Board of Shawnee County Comm’rs*, 24 Kan. App. 2d 294, 298, 944 P.2d 172 (1997).

¹⁴ *Harris v. Comfort Keepers*, No. 1,058,976, 2012 WL 1652981 (Kan. WCAB Apr. 30, 2012).

¹⁵ *Id.* at 3.

premises exception to the going and coming rule, embodied in K.S.A. 2012 Supp. 44-508(f)(3)(B), is applicable to this claim.

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.¹⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁷

WHEREFORE, the undersigned Board Member finds that the June 7, 2013, preliminary hearing Order entered by ALJ Thomas Klein is affirmed.

IT IS SO ORDERED.

Dated this 10th day of September, 2013.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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¹⁶ K.S.A. 44-534a.

¹⁷ K.S.A. 2012 Supp. 44-555c(k).