

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**SCOTT AARON LESLIE** )  
Claimant )  
V. )  
**TRUETT CONSTRUCTION AND ROOFING** )  
Respondent )  
AND )  
**RIVERPORT INSURANCE CO.** )  
Insurance Carrier )

Docket No. 1,075,344

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the April 7, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Joseph Seiwert of Wichita, Kansas, appeared for claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant was an independent contractor and not an employee of respondent on September 2, 2015.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 4, 2016, Preliminary Hearing and the exhibits, and the transcript of the February 18, 2016, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Claimant argues he was an employee of respondent at the time of his accident. Claimant contends respondent exercised its right to control, thereby making him a "worker" as defined by the Kansas Workers Compensation Act.

Respondent argues the ALJ's Order should be affirmed because claimant was a self-employed sole proprietor at the time of the accident. Respondent maintains claimant could not be an employer and an employee simultaneously.

The issue for the Board's review is: was claimant an employee of respondent on September 2, 2015?

**FINDINGS OF FACT**

Respondent is primarily a roofing construction business, which also provides some siding and guttering. Scott Truett, owner of respondent, testified he has no employees other than a secretary and some sales help. Mr. Truett stated:

A. Basically I sub all my contracts out just due to the work comp and OSHA rules. They are so strict on penalties.

Q. Okay. So when you say you sub it out, you hire subcontractors to perform the actual work activities on projects that you secure and bid?

...

A. Correct.<sup>1</sup>

Beginning May 2015, respondent had a subcontract to work on the Presbyterian Manor in Wichita, Kansas. Paric Construction was the general contractor on the project. Mr. Truett explained he contracted with three crews to complete the project, one of which included claimant. Mr. Truett stated he contracted with claimant's company, Leslie Custom Masonry, when the project slipped behind schedule. Leslie Custom Masonry was contracted to install siding. Mr. Truett described:

Q. What was the nature of the agreement reached between you and [claimant] and his company?

A. That he was going to subcontract and install my siding for me on the Manor.<sup>2</sup>

Claimant testified he began working the Presbyterian Manor project in late August 2015, along with his crew of five workers. Claimant was initially going to do the job "piece work," meaning he and his crew would be paid by each square of siding.<sup>3</sup> Claimant stated he would lose money due to the nature of the job, so he negotiated with Mr. Truett to be paid hourly. Mr. Truett testified he does not usually offer hourly pay, but this job was difficult, and he did not want the crews to leave. Claimant indicated he made this arrangement during lunch on his first day. Claimant received checks from respondent in both his name and that of his company, Leslie Custom Masonry. No monies were withheld

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<sup>1</sup> P.H. Trans. (Jan. 4, 2016) at 59.

<sup>2</sup> *Id.* at 63.

<sup>3</sup> See *id.* at 14-15.

from the checks, and claimant received no fringe benefits from respondent. Claimant explained he paid his crew from the checks he received.

Claimant completed a W-9 for respondent under his personal name and Social Security number.<sup>4</sup> Claimant did not complete a job application. He signed an Affidavit of Workers Compensation Exemption Under the Kansas Roofing Registration Act, listing him as the sole proprietor of Leslie Custom Masonry with no employees.<sup>5</sup> Claimant also provided a Certificate of Liability Insurance related to Leslie Custom Masonry, indicating claimant did not have workers compensation insurance.<sup>6</sup> Claimant said he did not have workers compensation insurance because it was too expensive. He testified:

Q. And did anyone ever talk to you about needing worker compensation insurance on the job?

A. No.

Q. Did you have any discussion with Mr. Truett or anyone else about workers compensation coverage?

A. No.

Q. In the trade that you work in, do you typically work on a job without having insurance?

A. Generally, if I as the sub doesn't have workmen's comp, whoever I'm subbing for provides it. I work under their workmen's comp.

Q. Okay. And if you're not asked about workers compensation insurance, what do you conclude from that?

A. I just assume I'm under theirs.<sup>7</sup>

Before beginning work on the project, claimant and his crew underwent safety training in the form of a video as required by Paric Construction. Claimant stated he was responsible for hiring his own crew and setting the hours worked. Each crew could work 8 to 10 hours per day. Claimant indicated his crew worked the same hours as the other crews. Claimant stated he did not feel he could leave the job as he pleased because he

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<sup>4</sup> See *id.*, Resp. Ex. 2.

<sup>5</sup> See P.H. Trans. (Jan. 4, 2016), Resp. Ex. 3.

<sup>6</sup> See P.H. Trans. (Jan. 4, 2016), Resp. Ex. 4.

<sup>7</sup> P.H. Trans. (Jan. 4, 2016) at 24-25.

had to be present to be paid. He stated he did not feel he could work different hours than everyone else onsite because “[i]t was just a set job; it’s just the way the job was.”<sup>8</sup> Claimant later agreed he decided when and for how long his crew would work; no one from respondent told him how many hours per day they must work. Mr. Truett testified he never told claimant that he must work any specific or set hours at the job site.

Claimant testified he did not bid on other projects because he felt the Presbyterian Manor job would be long-term, for at least six months in duration. He agreed he never entered into any contract stating how long the project would last. Claimant stated he understood he and his crew would be “let go” if their work was not done to respondent’s satisfaction.

Josh Hecker is a self-employed contractor with his own workers compensation insurance. He worked on the Presbyterian Manor job with respondent beginning June 2015. Respondent paid Mr. Hecker by the piece and not hourly. Mr. Hecker stated he has no employees but instead uses subcontractors. Mr. Hecker has worked with respondent on other projects in the past. Claimant testified it was his understanding Mr. Hecker worked for respondent. Claimant indicated Mr. Truett directed him to consult with Mr. Hecker regarding the job. Claimant stated he met with Mr. Hecker daily and was given assignments, and said Mr. Hecker once took some of claimant’s crew to work on another area of the site. Further, claimant testified Mr. Hecker inspected his work and on occasion directed him to redo tasks at the work site.

Both Mr. Truett and Mr. Hecker denied claimant’s testimony. Mr. Truett testified he never instructed claimant to report to Mr. Hecker, but instead suggested claimant refer questions to Mr. Hecker since Mr. Hecker had been on the site since the beginning of the project. Mr. Truett stated Mr. Hecker was not an agent of respondent nor the boss of any other crew. Mr. Hecker agreed with Mr. Truett.

Mr. Hecker testified the other crews would occasionally ask him questions because he had been onsite the longest and had a general understanding of the job. Mr. Hecker stated that beyond giving claimant basic information regarding job specifications, he did not direct claimant or claimant’s crew in the day-to-day application of siding. Mr. Hecker also denied using claimant’s crew:

Q. [Claimant] testified that you would come and take members of his crew and go use them somewhere else on the job site.

A. No, I have my own guys; I got, you know, like I said, two other guys working for me.<sup>9</sup>

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<sup>8</sup> *Id.* at 24.

<sup>9</sup> *Id.* at 96.

Claimant explained he and his crew used siding material, including nails and caulking, provided by respondent. He said, "Yes, [respondent] provided everything. The only thing we provided was labor. . . . And our personal hand tools."<sup>10</sup> Claimant said they also used some ladders, which were necessary to do the job. He later testified:

Q. Now, so when you meet Mr. Scott Truett and agree to perform siding work, your intention was you were going to go out, do the siding work, provide your own tools, your own equipment and your own employees to do this job, correct?

A. Yes.<sup>11</sup>

Mr. Truett stated he never provided any tools or equipment to claimant and his crew. Mr. Hecker testified he used his own equipment as well, aside from manlifts rented by respondent. Mr. Hecker explained the manlifts were necessary to perform some parts of the project, but claimant's crew worked an area which only required ladders to complete.

Claimant testified he worked onsite every day except an optional Saturday. Mr. Hecker stated there were times he noticed claimant's crew working without claimant present.

On September 2, 2015, claimant was on a third-floor balcony pulling materials up with a rope when the balcony safety railing broke. Claimant fell to the ground and sustained injuries to both lower extremities. Claimant was admitted to the Wesley Medical Center and treated by orthopedic surgeon Dr. Ryan Ficco. Claimant was in a wheelchair at the time of the January 2016 hearing.

#### PRINCIPLES OF LAW

K.S.A. 2015 Supp. 44-501b(c) states, in part:

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.

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<sup>10</sup> *Id.* at 26.

<sup>11</sup> *Id.* at 38.

K.S.A. 2015 Supp. 44-508(h) defines burden of proof:

“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 . . . .<sup>12</sup>

K.S.A. 2015 Supp. 44-508(b) states:

“Workman” or “employee” or “worker” means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include, but not be limited to: . . . volunteers in any employment, if the employer has filed an election to extend coverage to such volunteers; minors, whether such minors are legally or illegally employed; and persons performing community service work, but only to the extent and during such periods as they are performing community service work and if an election has been filed an election to extend coverage to such persons. Any reference to an employee who has been injured shall, where the employee is dead, include a reference to the employee's dependents, to the employee's legal representatives, or, if the employee is a minor or an incapacitated person, to the employee's guardian or conservator. Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a, and amendments thereto, such terms shall not include individual employers, limited liability company members, partners or self-employed persons.

There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>13</sup> The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.<sup>14</sup>

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.<sup>15</sup>

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<sup>12</sup> See *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

<sup>13</sup> See *Wallis v. Sec'y of Kansas Dep't of Human Resources.*, 236 Kan. 97, 102, 689 P.2d 787 (1984).

<sup>14</sup> See *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

<sup>15</sup> See *Wallis, supra*, at 102-03; citing *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

The Court of Appeals in *Miller v. Bethel Baptist Church*,<sup>16</sup> summarized the list of factors to determine if an employee is an independent contractor to include:

1. The existence of the right of the employer to require compliance with instructions;
2. The extent of any training provided by the employer;
3. The degree of integration of the worker's services into the business of the employer;
4. The requirement that the services be provided personally by the worker;
5. The existence of hiring, supervising, and paying assistants by the worker;
6. The existence of a continuing relationship between the worker and the employer;
7. The degree of establishment of set work hours;
8. The requirement of full-time work
9. The degree of performance of work on the employer's premises;
10. The degree to which the employer sets the order and sequence of work;
11. Whether payment is by the hour, day, or job;
12. The extent to which the employer pays business or travel expenses of the worker;
13. The degree to which the employer furnishes tools, equipment, and material; and
14. Whether the employer has the right to discharge or terminate the worker.<sup>17</sup>

The Kansas Court, in *Miller*, also considered the factors set out in the Restatement (Second) of Agency § 220(2) (1957), as relied upon by the Court in *Knorp v. Albert*,<sup>18</sup> including:

1. The extent of control which, by the agreement, the master may exercise over the details of the work;
2. Whether the one employed is engaged in a distinct occupation or business;

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<sup>16</sup> *Miller v. Bethel Baptist Church*, No. 113,113, 356 P.3d 436 (Kansas Court of Appeals unpublished opinion filed Sept. 18, 2015).

<sup>17</sup> *Id.* at 4. Citing *Hartford Underwriters Ins. Co.*, 272 Kan. at 271, 32 P.3d 1146; *Hill v. Kansas Dept. of Labor*, 42 Kan.App.2d 215, 222–23, 210 P.3d 647 (2009); and *Crawford v. Kansas Dept. of Human Resources*, 17 Kan.App.2d 707, 710, 845 P.2d 703 (1989), *rev. denied* 246 Kan. 766 (1990).

<sup>18</sup> *Knorp v. Albert*, 29 Kan.App.2d 509, 514, 28 P.3d 1024, *rev. denied* 272 Kan. 1418 (2001).

3. The method of payment, whether by the time or by the job;
4. Whether the work is a part of the regular business of the employer;  
and
5. Whether the parties believe they are creating the relation of master  
and servant.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>19</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>20</sup>

#### ANALYSIS

The ALJ found it notable claimant maintained control over his employees, negotiated better, more favorable terms for himself and his employees, and paid his employees out of proceeds paid directly to him. The undersigned agrees.

In addition to the findings noted by the ALJ, several other factors suggest claimant was an independent contractor. Claimant, when he realized he was losing money by working on a piece rate, renegotiated the contract to reflect an hourly rate for him and his employees. Claimant and his crew received no training by respondent. Claimant and his employees were required to attend safety training, which was provided by the general contractor, not respondent. Claimant and his employees presented themselves at the work site with their own hand tools. Respondent did not set the order and sequence of work required by claimant and his crew.

There was no requirement that the services be provided personally by claimant. Claimant hired, supervised and paid his own employees. Claimant was responsible for paying his own crew out of the money received on the contract. There was no long-term relationship between claimant and respondent, as this was the first and only time claimant worked with respondent. There were no set work hours. The work site opened and closed at a set time, during which subcontractors were allowed access to the project.

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<sup>19</sup> 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).

<sup>20</sup> K.S.A. 2015 Supp. 44-555c(j).

Respondent cites *Home Design, Inc. v. Kansas Dep't of Human Res.*,<sup>21</sup> in support of the general principal that siding contractors are independent contractors. The Court in the Home Design case noted it was “[a]n important factor was that there was no continuity in the relationship between Home Design and the siding installers.”<sup>22</sup>

The Court, in *Home Design*, wrote:

In sum, the siding installers were free to set their own hours so long as the job was completed within a reasonable time frame (with only the minimal requirement that they should be there at a decent time, in decent clothes, and put in a day's work). The siding installers were paid by the job and were free to turn down work, work for other siding companies, or negotiate for better deals, and some of the more sophisticated and experienced siding installers did so. Home Design provided no equipment or training. It is true that the siding installers were given certain general instructions, but it appears they were not subject to the control of Home Design in any meaningful sense other than as to results.<sup>23</sup>

Such is the case here. The weight of evidence supports the ALJ's finding claimant was an independent contractor, not an employee.

#### CONCLUSION

Claimant was an independent contractor.

#### ORDER

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated April 7, 2016, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2016.

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HONORABLE SETH G. VALERIUS  
BOARD MEMBER

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<sup>21</sup> *Home Design, Inc. v. Kansas Dep't of Human Res.*, 27 Kan. App. 2d 242, 247, 2 P.3d 789, rev. denied 269 Kan. 932 (2000).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

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