BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY S. LAWRENCE Claimant VS. **SMART WAY SERVICE** Respondent AND **HARTFORD ACCIDENT & INDEMNITY CO.** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	))))))))))))))	Docket No. 140,046

ORDER

The Appeals Board has considered the respondent's request to review the Award of Administrative Law Judge James R. Ward entered in this proceeding on June 1, 1994.

APPEARANCES

Claimant appeared by his attorney, Michael R. Wallace of Overland Park, Kansas. The respondent and insurance carrier appeared by their attorney, Richmond M. Enochs of Overland Park, Kansas. The Workers Compensation Fund appeared by its attorney, Robert L. Kennedy of Kansas City, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge found claimant was a statutory employee of the respondent and entitled to permanent partial disability benefits based upon a sixty percent (60%) work disability. The respondent and insurance carrier now request the Appeals Board to review the following issues:

(1) Whether claimant was an employee or independent contractor for purposes of the Kansas Workers Compensation Act;

(2) Average weekly wage;

(3) Whether claimant is entitled to additional temporary total disability compensation; and

(4) Nature and extent of disability.

Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

(1) For the reasons expressed below, the Appeals Board finds claimant should be denied benefits under the Workers Compensation Act, and, therefore, the Award of the Administrative Law Judge should be set aside.

In essence, before one is entitled to benefits under the Workers Compensation Act, the injured person must either be an employee of the respondent or fall within the coverage provisions of K.S.A. 44-503.

Under the Workers Compensation Act, "employee" is synonymous with the terms "workman" or "worker" and means "any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer." Those terms do not include individual employers, limited or general partners, or self-employed persons unless a valid election has been filed to come under the provisions of the Act. See K.S.A. 44-508.

When subcontracting is involved, K.S.A. 44-503 is applicable and in some instances requires a principal or contractor to provide workers compensation benefits to an employee of a subcontractor. Because the date of accident is June of 1990, the applicable version of the statute is K.S.A. 44-503 [Ensley], which provides:

"(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he 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 workman employed in the execution of the work any compensation under the workmen's compensation act which he would have been liable to pay if that workman had been immediately employed by him; . . ."

Although a good argument may be made that one of the primary purposes of K.S.A. 44-503 was to prevent individuals from avoiding liability under the Workers Compensation Act by regularly hiring others as independent contractors to conduct their principal trade or business, the case of Allen v. Mills, 11 Kan. App. 2d 415, 724 P.2d 143 (1986), holds that a self-employed person cannot be an employee of himself and, therefore, does not fall within the provisions of the statute.

Claimant was not an employee of the respondent. The respondent contracted with claimant's father in an arm's-length transaction for the cleaning of windows at the apartment complex where claimant was injured. Respondent agreed to pay the sum of $2,500 for these services. Although in one instance respondent asked that certain windows be redone, the respondent exercised no control over claimant's work activities. Claimant and his father furnished their own tools and equipment. Respondent was interested in the final result only.

The primary test in determining whether an employer-employee relationship exists is whether the employer has 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. Falls v. Scott, 249 Kan. 54, 64, 815 P.2d 1104 (1991).

In cleaning the windows at the apartment complex, claimant and his father were involved in a joint venture. Claimant was not paid wages. Father and son were to evenly divide any profits remaining after payment of expenses. Claimant was not an employee of his father. Claimant's father did not direct his activities, nor did he possess the right to control. Claimant was the only individual with experience and knowledge of the work involved. Because claimant was not an employee of his father, Allen v. Mills, *supra*, dictates that K.S.A. 44-503 [Ensley] may not be applied to afford claimant benefits.

Because claimant was neither an employee of the respondent, nor an employee of a subcontractor, claimant is not entitled benefits under the Kansas Workers Compensation Act.

(2) By reason of the above finding, the remaining issues are rendered moot.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge James R. Ward entered in this proceeding on June 1, 1994, should be, and hereby is, set aside; that benefits under the Workers Compensation Act are denied.

Reporters' fees are taxed as costs against the respondent and insurance carrier to be paid directly as follows:

Metropolitan Court Reporters Inc.	$437.60
Hostetler & Associates Inc.	$902.60
Richard Kupper & Associates	$653.00

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

We respectfully disagree with the majority opinion. Allen v. Mills, *supra*, should be limited to the facts of that case and applied only where there is an arm's-length transaction and the injured party is truly a self-employed person engaged in an ongoing business endeavor. The case can also be distinguished from the present factual situation because it involves contractors and subcontractors, an entirely different situation than in Allen v. Mills. In this proceeding, although claimant was engaged in a joint venture with his father, he should not be considered self-employed because he was not engaged in an ongoing business endeavor and was merely working a few hours a day on the window-cleaning project after finishing his shift at the factory where he was regularly employed. To hold otherwise is to throw open the door to allow individuals to conduct their entire business operations under the guise of hiring "independent contractors" and thereby avoid the requirements of the Workers Compensation Act. Because the respondent, Smart Way, had contracted with the apartment complex to clean windows and Smart Way then subcontracted with claimant and claimant's father to perform that job, K.S.A. 44-503 [Ensley] should be interpreted to entitle claimant to workers compensation benefits. The legislative mandate is to liberally construe the Workers Compensation Act to bring both employers and employees within its provisions to protect both. See K.S.A. 44-501(g).

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Wallace, Overland Park, KS
Richmond M. Enochs, Overland Park, KS
Robert L. Kennedy, Kansas City, KS
James R. Ward, Administrative Law Judge
George Gomez, Director