BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAYMOND EARL MORRIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 140,646
WORK FORCE, INC.	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

On the 28th day of December, 1993, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge Marvin R. Appling on November 24, 1993, came on for oral argument by telephone conference. A decision was rendered by the Appeals Board on February 25, 1994. The matter was then appealed to the Kansas Court of Appeals in Docket No. 71,365. The Court of Appeals remanded this matter back to the Appeals Board finding that the Board's decision had been rendered by a Board which was ruled unconstitutional by the Kansas Supreme Court in Sedlak v. Dick, 256 Kan. 779 (1995). The Appeals Court's Order of Remand required reconsideration of this matter by the "new" Board. The following is the order of the new Board.

APPEARANCES

The claimant appeared by and through his attorney, Frank D. Taff, of Topeka, Kansas. The respondent and insurance carrier, appeared by and through their attorney, Gary R. Terrill, of Overland Park, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) Whether claimant's accidental injury arose out of and in the course of his employment with Work Force, Inc., or with Morris Construction Company.

(2) What is claimant's average weekly wage?

(3) Is claimant entitled to additional temporary total disability compensation for the periods September 10, 1989 through November 8, 1989; March 9, 1990 through July 7, 1990; and March 29, 1991 through September 10, 1991?

(4) Is claimant entitled to future medical treatment and physical restoration?

(5) Is claimant entitled to unauthorized medical expense in the amount of $350.00 even though no such expense has been incurred by claimant?

(6) What is the nature and extent of claimant's disability?

(7) What, if any, additional compensation is claimant entitled to?

(8) What is the relationship between the claimant and the respondent, Work Force, Inc., and what, if any, effect does this "leased employee" relationship have on claimant's entitlement to an award?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) Claimant has failed to prove by a preponderance of the credible evidence that he suffered an injury arising out of and in the course of his employment with Work Force, Inc.

The claimant, Raymond Morris, suffered injury to his low back when he fell while nailing trusses approximately eight feet off the floor at a construction site in Osage County, Kansas. At the time claimant was under subcontract with Showcase Homes to frame certain houses for Showcase Homes. Claimant had been in the construction business working under the name Morris Construction for approximately 10 years.

Prior to the date of injury claimant entered into a lease agreement with Work Force, Inc., wherein claimant would lease his laborers from Work Force, Inc., and in return would pay to Work Force, Inc. funds sufficient to pay the workers' hourly rates, all employment taxes, workers compensation insurance premiums for the leased employees, and a small amount sufficient to reimburse Work Force, Inc. for its efforts.

Claimant was paid money out of these funds from Work Force, Inc. to perform certain tasks for Work Force, Inc., i.e., specifically to check on the laborers, give beginning instructions, collect and compute working hours of leased employees, certify that hours submitted by leased employees are correct, deliver by phone or personally payroll information to main office on a regular basis, collect necessary paper work from new employees, interview new employees at the job sites, discharge unsatisfactory employees at job sites. The workers compensation insurance provided by Work Force, Inc. was to be in effect only during the time claimant was performing the above described duties for Work Force, Inc.

In return claimant was to be paid for approximately 10 hours work per week at the rate of $5.00 per hour, totalling $50.00 per week for each week claimant performed these services.

In the 26 weeks preceding the claimant's alleged date of injury he performed these services on 10 different occasions.

Claimant was not reimbursed by Work Force, Inc. for any framing work resulting from the contract between Morris Construction and Showcase Homes. Work Force, Inc. had no right to control and maintained no control over the manner in which claimant's framing work was performed. Work Force, Inc. provided no tools to the claimant. Work Force, Inc. expressed no specifications regarding the quality of the framing work. Evans v. Board of Education of Hays, 178 Kan. 275, 284 P.2d 1068 (1955); McCarty v. Great Bend Board of Education, 195 Kan. 310, 403 P.2d 956 (1965).

There was no contractual relationship between Work Force, Inc. and Showcase Homes. The only contractual relationship dealing with the framing of these homes was between Morris Construction and Showcase Homes.

Claimant elected to purchase no workers compensation insurance on himself even though he had been advised by Lorinda Smith, president of Work Force, Inc., that workers compensation insurance would be advisable. He was advised by Ms. Smith that his workers compensation coverage through Work Force, Inc. only covered him during the periods of time when claimant was performing services for Work Force, Inc.

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

> "If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, 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."

K.S.A. 44-508(g) defines burden of proof as follows:

> "'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."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all of the conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

"The phrase 'out of' the employment points to the cause or the origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, on consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises 'out of' the employment if it arises out of the nature, conditions, obligations, and incidents of the employment." Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

"The phrase 'in the course of' employment relates to the time, place and circumstances under which the accident occurred, and means the injury occurred while the workman was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

The uncontradicted evidence in this case is that the claimant, when injured, was performing work under contract with Showcase Homes as an employee of Morris Construction. The claimant was not performing work for Work Force, Inc. at the time of the injury, and as such Work Force, Inc. would have no liability stemming from the injury of August 10, 1989.

The Appeals Board must next consider the liability, if any, of Morris Construction.

K.S.A. 44-508(b) which defines workman, employee or worker, states in part:

> "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 or general partners or self-employed persons."

As the claimant, by his own admission, was a self-employed person, only by filing an election under K.S.A. 44-542a would claimant be entitled to come within the provisions of the Kansas Workers Compensation Act.

K.S.A. 44-542a states in part:

> "Each individual employer, partner or self-employed person may elect to bring himself or herself within the provisions of the workmen's compensation act, by securing and keeping insured such liability in accordance with clause (1) of subsection (b) of K.S.A. 44-532. Such insurance coverage shall clearly indicate the intention of the parties to provide coverage for such employer, partner or self-employed person."

By claimant's own admission no such liability insurance had been purchased. With no valid insurance contract in effect, the claimant, as a self-employed person, would not come under the rules and regulations of the Kansas Workers Compensation Act.

The Appeals Board finds that claimant has failed to provide proof of an election to bring himself within the provisions of the Kansas Workers Compensation Act in that claimant failed to secure workers compensation insurance as is required under K.S.A. 44-542a. Claimant, in failing to elect to bring himself under the provisions of the Kansas

Workers Compensation Act, has no workers compensation claim against Morris Construction for liability stemming from the injury suffered on August 10, 1989.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Special Administrative Law Judge Marvin R. Appling dated November 24, 1993, is reversed and the claimant, Raymond Earl Morris, shall be and is denied any award against Work Force, Inc. and Insurance Company of North America, as claimant has not proven an injury arising out of and in the course of his employment with Work Force, Inc.; the Appeals Board further finds that claimant has failed to bring himself within the provision of the Kansas Workers Compensation Act by securing and keeping insurance in accordance with the requirements of K.S.A. 445-542a, and as such, has no claim against Morris Construction for the injuries arising on August 10, 1989.

As claimant has failed to prove an injury arising out of and in the course of his employment with Work Force, Inc. and has further failed to show any liability on the part of Morris Construction due to his failure to elect under K.S.A. 44-542a, the remaining issues in this matter are rendered moot.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent, to be paid as follows:

APPINO & ACHTEN REPORTING SERVICE		
Transcript of Preliminary Hearing		$ 224.60
Transcript of Preliminary Hearing		$ 274.60
Transcript of Preliminary Hearing		$ 239.30
Transcript of Preliminary Hearing		$ 88.00
Transcript of Preliminary Hearing		$ 171.90
Transcript of Regular Hearing		$ 239.60
Deposition of Stephen J. Burd		$ 220.25
	TOTAL	$1458.25
CURTIS, SCHLOETZER, HEDBERG, FOSTER AND ASSOCIATES		
Transcript of Preliminary Hearing		$ 286.20
Transcript of Preliminary Hearing		$ 234.45
Deposition of Stephen J. Burd		$ 449.00
	TOTAL	$ 969.65
KRISTINE D. CORRELL		
Deposition of Lorinda L. Smith		$ 645.60
MARVIN R. APPLING		
Fees as Special Administrative Law Judge		$ 150.00

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

_____
BOARD MEMBER

_____
BOARD MEMBER

BOARD MEMBER

cc: Frank D. Taff, 3601 SW 29th, Topeka, Kansas 66614
Gary R. Terrill, P.O. Box 12290, Overland Park, Kansas 66282
Marvin R. Appling, Special Administrative Law Judge
George Gomez, Director