

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

JOSE WASHBURN
Claimant

VS.

SHAWN WILSON AND JOYCE REED
d/b/a/ **THE JUNGLE**
Respondent

AND

UNINSURED
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND



Docket No. 157,932

ORDER

Claimant appeals an Award entered by Special Administrative Law Judge William F. Morrissey dated October 10, 1994. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Michael C. Helbert of Emporia, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Diane F. Barger of Emporia, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations entered in the October 10, 1994 Award.

ISSUES

Claimant raised the following single issue for Appeals Board review:

- (1) Whether claimant suffered an accidental injury that arose out of and in the course of his employment with the respondent.

The Kansas Workers Compensation Fund (Fund), during oral argument before the Appeals Board, raised the following additional issue:

- (2) Whether respondent's payroll met the \$10,000 annual requirement for the parties to be subject to the Kansas Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs and arguments of the parties, the Appeals Board finds as follows:

The respondent, The Jungle, was a bar located in Emporia, Kansas, and co-owned by Shawn Wilson and Joyce Reed. Claimant alleges he was injured while he was performing bartender duties in the early morning hours of June 30, 1991. The fact that the claimant fractured his right ankle shortly after 2:00 a.m. on June 30, 1991 while he was inside the bar owned by Shawn Wilson and Joyce Reed is not disputed. However, the Fund does dispute whether the parties are subject to the workers compensation act and whether claimant's broken ankle arose out of and in the course of his employment with the respondent. The respondent in this matter is uninsured and was found by the Special Administrative Law Judge, based on the testimony of co-owner Shawn Wilson, to be financially unable to pay compensation to the injured claimant as required by the workers compensation act. The claimant, therefore, impleaded the Fund pursuant to K.S.A. 44-532a(a) (Ensley) which provides for the Fund to pay benefits when the respondent is uninsured and insolvent, if the claim is determined to be compensable. The insolvency issue was not appealed to the Appeals Board by the Fund. Accordingly, if this claim is found to be compensable, the Fund is liable for all compensation benefits awarded to the claimant.

On appeal, the first issue the Appeals Board will address is whether the Kansas Workers Compensation Act applies to the parties. The respondent argues that the respondent's gross annual payroll for the preceding calendar year did not amount to \$10,000 or more and that the employer did not reasonably estimate that a total gross annual payroll for the calendar year of 1991 would not amount to \$10,000 or more for all employees. See K.S.A. 44-505(a)(2) (Ensley). The Special Administrative Law Judge found that co-owner Shawn Wilson's testimony established that the projected payroll for the calendar year of 1991 was in excess of \$10,000. The Appeals Board affirms that finding. Mr. Wilson's testimony established that on weekends the respondent employed at least eight individual employees. He also testified that payroll taxes were unpaid as of August of 1991 in the amount of \$6,000. The claimant submitted a wage statement that was prepared by the respondent, which was admitted at the regular hearing, that showed the claimant had earned \$2,465.24 from March 4, 1991 through June 24, 1991. The Appeals Board finds that the totality of that evidence established a reasonable expectation of a payroll for the respondent in 1991 in excess of \$10,000.

The remaining issue for review in this case is whether claimant was working for the respondent at the time he was attacked from behind by customers of the bar which resulted in his left ankle being fractured. The Special Administrative Law Judge found that it was more probably true than not that the attack arose out of animosity from an earlier fight rather than from an incident of claimant's employment. The Appeals Board affirms the Special Administrative Law Judge's finding that claimant did not suffer a work-related injury. For the reasons that follow, the Appeals Board finds the claimant was not working for the respondent when his ankle was fractured. Claimant testified that he had been off work since 10:00 p.m., on the night of the accident, and was watching television in an upstairs apartment he shared with co-owner Shawn Wilson, when he heard a fight going on outside. Claimant indicated that he went outside and broke up a fight between the Alvarado family and the Galendoes family. At that time, claimant testified he was instructed by Johnny Alvarado to go inside the bar and help remove the alcohol from the tables. The police, who had been called because of the fight, had ordered the alcohol removed and also state law required the bar to clear the alcohol from the tables by 2:00

a.m. Claimant contends that Johnny Alvarado was a supervisor for the bar and had the authority to put the claimant to work. Claimant also testified that when he asked Mr. Alvarado if he was on the clock, Mr. Alvarado told him he would take care of it. Claimant testified that he was injured as he was clearing the tables off inside the bar when someone jumped him from behind. Claimant, when asked whether Shawn Wilson was present that night when the fights took place, replied he was unsure.

Mr. Shawn Wilson, co-owner of the bar, presented testimony in this case that was quite in contrast to the testimony of the claimant. Mr. Wilson testified that claimant had gotten off work at 12:00 midnight but had stayed at the bar drinking with some friends. Mr. Wilson indicated that he was present when the first fight broke out outside the bar. Mr. Wilson testified that the fighting had stopped by the time he got outside. However, he found claimant shouting loudly, in both Spanish and English at the Galendoes family, which was inflaming the situation. Mr. Wilson told the claimant to get inside the bar and to shut up and claimant responded to his request. Mr. Wilson testified he did not request the claimant to start working in order to clean alcohol off the tables. Mr. Wilson had plenty of people working that night to clean the tables and did not need the claimant to work. Additionally, Mr. Wilson testified that Johnny Alvarado, the boyfriend of co-owner Joyce Reed, had no ownership interest in the bar and had no supervisory responsibility. Mr. Alvarado did occasionally perform bartending duties and doorman duties, but he was not paid for performing these duties. Mr. Wilson was very specific in his testimony that the claimant, on the night in question, was not working for the respondent when he was attacked by customers inside the bar and fractured his right ankle.

Based on the whole evidentiary record, the Appeals Board finds that the claimant was not working for the respondent at the time he was attacked by customers in the bar on June 30, 1991. Even if claimant did start cleaning tables at the request of Johnny Alvarado, as the claimant testified, Mr. Wilson, co-owner of the bar, established that Mr. Alvarado had no ownership interest in the bar and was not an employee of the respondent. Therefore, the Appeals Board finds that Johnny Alvarado had no authority to authorize the claimant to clear the tables of alcohol on the night in question so as to place such work within an employment relationship.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated October 10, 1994, is affirmed and an award in favor of the claimant, Jose Washburn, and against the respondents, Shawn Wilson and Joyce Reed d/b/a The Jungle, and the Kansas Workers Compensation Fund, for an accidental injury which occurred on June 30, 1991 is hereby denied.

Because the respondent is uninsured and insolvent, fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed to the Kansas Workers Compensation Fund to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Nora Lyon & Associates Transcript of Regular Hearing	\$158.70
Deposition of Jose Washburn	\$140.20
Appino & Achten Reporting Service Deposition of Nathan Shechter, M.D.	\$ 90.50

Deposition of David J. Edwards, M.D.
Deposition of Shawn Wilson

\$109.55
Unknown

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael C. Helbert, Emporia, KS
Diane F. Barger, Emporia, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director