

The Appeals Board has authority to review this Preliminary Hearing Order as the issue raised by the Fund questions whether the claimant's accidental injury arose out of and in the course of an employment relationship that is subject to the Workers Compensation Act. K.S.A. 44-534a(a)(2).

Administrative Law Judge Shannon S. Krysl, in a Preliminary Hearing Order dated September 8, 1994, found that claimant was an employee of R & R and not an independent contractor. She also found that claimant was a statutory employee, pursuant to K.S.A. 44-503, of Farmland Foods, Inc., (Farmland) and ordered the requested preliminary compensation benefits paid to the claimant by Farmland. Farmland appealed to the Appeals Board and in an Order dated June 30, 1995, the Appeals Board reversed the Administrative Law Judge's decision finding that the claimant was not a statutory employee of Farmland. The Appeals Board also remanded the Preliminary Hearing Order to the Administrative Law Judge for determination of the question of whether R & R was liable for the preliminary hearing benefits requested by the claimant.

On remand, the Administrative Law Judge heard arguments of the parties during a hearing held on July 25, 1995, on the issue of R & R's liability for claimant's requested preliminary hearing benefits. In an Order dated July 25, 1995, which is the subject of this appeal, the Fund was found liable for the preliminary benefits originally ordered on September 8, 1994. The issues that the Administrative Law Judge had to address on remand were whether R & R met the payroll requirements of K.S.A. 44-505(a) and, if requirements were met, was R & R financially capable of paying the requested benefits. The Administrative Law Judge made specific findings in the hearing transcript of July 25, 1995 that R & R had met the payroll requirements of K.S.A. 44-505(a), and that R & R was insolvent. Because of R & R's insolvency, the Fund was ordered to pay the preliminary benefits to the injured claimant pursuant to K.S.A. 44-532a. From that Order, the Fund appeals and argues that the preliminary hearing evidentiary record does not contain evidence that R & R's gross annual payroll was sufficient to meet the requirements of K.S.A. 44-505(a), and therefore, the parties are not subject to the Workers Compensation Act.

It is the claimant's burden of proof to establish his right to an award of compensation and to prove those conditions on which the claimant's right depends. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). Claimant's burden to prove coverage under the Act, also includes whether respondent has the requisite payroll requirements as set forth in K.S.A. 44-505(a). Brooks v. Lochner Builders, Inc., 5 Kan. App. 2d 152, 613 P.2d 389 (1980). The pertinent provisions of K.S.A. 44-505(a) provide as follows:

“ . . . the workers compensation act shall apply to all employments . . . except

....

....

“(2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees,”

The foregoing statute was changed effective July 1, 1993, from the ten thousand dollar (\$10,000.00) payroll requirement to a twenty thousand dollar (\$20,000.00) payroll requirement. The claimant's date of accident was November 12, 1993. The Appeals Board finds that the preliminary hearing evidentiary record does not contain evidence of R & R's annual payroll for 1992, which would be the calendar year preceding the claimant's date of accident on November 12, 1993. Accordingly, the Appeals Board finds that if R & R does meet the payroll requirements of K.S.A. 44-505(a), evidence has to prove it was unreasonable for R & R to estimate that it would not have a total gross annual payroll for 1993 of more than twenty thousand dollars (\$20,000.00) for all employees.

The Administrative Law Judge found that R & R's payroll could have been reasonably estimated to be in excess of twenty thousand dollars (\$20,000.00) for the calendar year of 1993. The Appeals Board affirms this finding. The Appeals Board finds that the testimony of the claimant and James W. Dustin, owner of R & R, established that in 1993 claimant, Kenny Brent, Ray Smith and Joe Marsh worked for R & R and were paid in the total amount of eighteen thousand, five hundred ninety-nine dollars and seventy-five cents (\$18,599.75) for work performed. The Administrative Law Judge in her previous Order found that the claimant was an employee of R & R and not an independent contractor. Such finding was subsequently affirmed by the Appeals Board. The Appeals Board also finds that the other three (3) mentioned workers were repairing pallets for R & R in 1993 and were employees of R & R instead of independent contractors. Mr. Dustin testified that Farmland was not R & R's only customer in 1993. He established that Cargill also was a customer in 1993 and amounted to fifty percent (50%) of R & R's business. Mr. Dustin and the claimant established that the material used to repair the pallets was obtained primarily from non-repairable pallets supplied by the customers. Accordingly, the Appeals Board finds that it is reasonable to conclude that the majority of the forty-nine thousand, nine hundred seventy-one dollars (\$49,971.00) cost of goods sold that is contained in Mr. Dustin's Schedule C of his Federal Tax Return for 1993, that is an exhibit to the preliminary hearing transcript of August 1, 1994, would have been wages paid to employees of R & R for the repair of pallets. The Appeals Board also finds that no wages are listed under Expenses on the Schedule C. It is then reasonable to conclude that the majority of this cost of goods sold amount would be made up of labor costs. The Appeals Board concludes that the preliminary hearing record contains credible evidence that R & R, in the calendar year of 1993, would have reasonably estimated that its payroll would have exceeded twenty thousand dollars (\$20,000.00). Accordingly, the parties are subject to the Workers Compensation Act.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Shannon S. Krysl, dated July 25, 1995, should be, and the same is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Joseph Seiwert, Wichita, Kansas
Edward D. Heath, Jr., Wichita, Kansas
Andrew E. Busch, Wichita, Kansas
Chris S. Cole, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director