

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

DONALD T. JONES
Claimant

VS.

BMC CONSTRUCTION
Respondent

AND

NONE
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND



Docket No. 193,079

ORDER

Respondent and the Kansas Workers Compensation Fund appeal from a November 30, 1994, Preliminary Order by which Administrative Law Judge Alvin E. Witwer granted claimant's request for temporary total disability and medical benefits.

ISSUES

Respondent and the Workers Compensation Fund contend:

- (1) Claimant has not proven he was an employee of respondent;
- (2) Claimant has not established respondent had a payroll of more than \$20,000 for the calendar year preceding the date of accident or in the alternative, that respondent reasonably expected to have a payroll of more than \$20,000 for the calendar year in which the accident occurred.

Claimant contends:

- (1) The issues raised on appeal are not ones properly subject to review on appeal from a preliminary order;
- (2) Claimant has established both that he was an employee and that respondent should have, on the date of the accident, reasonably

expected a payroll in excess of \$20,000 for the current calendar year.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and briefs of the parties, the Appeals Board finds and concludes:

(1) The issue raised by respondent, namely whether claimant has met his burden to show that he was an employee and that respondent met the payroll requirements of K.S.A. 44-505(a)(2), are issues subject to review on appeal from a preliminary order.

A determination that the injury arose out of and in the course of employment is expressly made subject to review under K.S.A. 44-534a. The Appeals Board considers a finding that claimant was or was not an employee to be a necessary part of the finding that the injury arose out of employment and, therefore, subject to review.

K.S.A. 44-551 authorizes review of any allegation that the Administrative Law Judge exceeded his or her jurisdiction in entering a preliminary order. The Kansas Workers Compensation Act does not apply to respondents who do not meet the payroll requirement. The Administrative Law Judge does not have jurisdiction to enter orders against respondents who do not have the requisite payroll. A finding relating to the payroll requirement is, therefore, also subject to review on appeal from a preliminary order.

(2) Claimant was working as an employee, not an independent contractor, on the date of his accident, June 10, 1994.

The record indicates respondent provided the tools and equipment, paid claimant by the hour, told him where to caulk and where to paint and could have fired claimant. The evidence establishes respondent had the right to control and did control claimant's work activities in a manner consistent with an employment relationship. The Appeals Board finds claimant was working as an employee of respondent at the time of the accident. See Jones v. City of Dodge City, 194 Kan. 777, 402 P.2d 108 (1965); McCarty v. Great Bend Board of Education, 195 Kan. 310, 403 P.2d 956 (1965); Shindhelm v. Razook, 190 Kan. 80, 372 P.2d 278 (1962).

(3) Claimant has failed to meet his burden to show that respondent had or expected to have the requisite payroll. The controlling statute, K.S.A. 44-505(a) states in pertinent part:

"(a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:

.....

(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,"

Once respondent raises the issue, the burden is upon the claimant to establish the requisite payroll. See Brooks v. Lochner Builders, Inc., 5 Kan. App. 2d 152, 613 P.2d 389 (1980).

Claimant has alleged and testified to an accident on June 10, 1994. Respondent's 1993 tax returns indicate respondent did not have a payroll of \$20,000 for the calendar

year preceding the date of accident. Claimant contends, however, that respondent should have reasonably estimated a payroll in excess of \$20,000 for the calendar year 1994. In support, claimant offered evidence of respondent's "labor costs" in 1994. Claimant then relies on the decision by the Kansas Court of Appeals in Fetzer v. Mark Boling Construction Co., 19 Kan. App. 2d 264, 867 P.2d 1067 (1994).

In Fetzer, the claimant worked for a remodeling company which began operations in March of 1989. During 1989 the respondent's company had a gross payroll of \$4,133.75. Owners of similar business had advised respondent to expect a slower second year. At that time the payroll requirement was only \$10,000 and respondent's insurance agent advised him that if his payroll did not exceed \$10,000 he would not need workers compensation coverage. Based upon this advice, respondent did not purchase workers compensation coverage for the calendar year of 1990. The respondent's gross payroll for the first quarter of 1990 was \$1,652.02. As of the date of injury, June 27, 1990, respondent's gross payroll had exceeded \$9,000.00. The evidence further indicated the respondent was an ongoing business with work in process and bids out on new projects. In analyzing the issues, the Court of Appeals first noted that the payroll requirements for application of the Workers Compensation Act were to be liberally construed in accordance with K.S.A. 44-501(g). The Court of Appeals also found that on the date of injury the employer could not reasonably have estimated his payroll would be less than \$10,000. The payroll requirements were, therefore, considered satisfied and the Kansas Workers Compensation Act applied.

Facts presented in this present case differ from those in Fetzer in two respects. First, in Fetzer, respondent was only a few hundred dollars from meeting the payroll requirement at the time of the injury. In this case, respondent had paid only slightly more than half of the full \$20,000 payroll. Second, the record in present case does not clearly establish ongoing business operation, such as that presented in Fetzer. Claimant does testify that at the time he was hired in June of 1994, respondent told him he had plenty of work. Respondent, on the other hand, testified that his work had started tapering off in June of 1994. The record contains no evidence that, as of the date of the accident, respondent had future jobs he was expecting or had agreed to perform. The record does not establish that respondent should have reasonably estimated the payroll for the second half of 1994 to be similar to that of the first half of 1994. For these reasons the Appeals Board finds the Fetzer case distinguishable and finds that claimant has not met his burden to establish that respondent reasonably expected a payroll of more than \$20,000 in 1994.

This finding renders moot respondents contention that claimant has not proven that the "labor costs" were for employees as opposed to independent contractors.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Order of Administrative Law Judge Alvin E. Witwer, dated November 30, 1994, should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Michael R. Wallace, Overland Park, KS
Mark E. Kolich, Kansas City, KS
Richard H. Wagstaff, III, Overland Park, KS
Alvin E. Witwer, Administrative Law Judge
George Gomez, Director