

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

MIKE NEWBERRY)	
Claimant)	
VS.)	
)	Docket No. 250,386
LAFORGE & BUDD CONSTRUCTION COMPANY)	
Respondent)	
AND)	
)	
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA)	
Insurance Carrier)	

ORDER

Claimant appealed Administrative Law Judge Jon L. Frobish's February 16, 2000, preliminary hearing Order.

ISSUES

Claimant claims he injured his left knee on October 6, 1999, while employed by the respondent. The Administrative Law Judge denied claimant's request for preliminary benefits. He found the parties were not subject to the Kansas Workers Compensation Act because claimant was not an employee of the respondent on the date of the accident.

On appeal, claimant contends the preliminary hearing record does establish that claimant was an employee of the respondent and not an independent contractor. Thus, claimant requests the Appeals Board to reverse the Administrative Law Judge's preliminary hearing Order and find the parties are subject to the Kansas Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments contained in the briefs of the parties, the Appeals Board concludes the Administrative Law Judge's preliminary hearing Order should be affirmed.

The primary test utilized in Kansas to determine whether an employer/employee relationship exists is the employer's right of control and supervision of the work of the alleged employee. This involves the right to direct the manner in which the work is performed as well as the result which is to be accomplished. It is not the actual exercise of control, but the right to control which is determinative.¹

¹ See McCubbin v. Walker, 256 Kan. 276, 886 P.2d 790 (1994); Falls v. Scott, 249 Kan. 54, 815 P.2d 1104 (1991); and Anderson v. Kingsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

As found by the Administrative Law Judge, the Appeals Board finds the evidence contained in the preliminary hearing record, at this juncture of the proceedings, supports the conclusion that claimant was not an employee but was an independent contractor of the respondent on the date of the accident. The claimant contracted with the respondent to lay a brick sidewalk. The respondent prepared the area and supplied claimant with the sand and brick necessary to lay the sidewalk. Claimant supplied his own tools except for a period of time when respondent provided claimant with a masonry saw. But before the project was completed, claimant purchased a masonry saw and deducted the use of respondent's saw from the final billing statement to the respondent. Claimant was not required to work any specific hours but worked the hours most suitable for him to be able to work on other projects for the respondent and other general contractors. Respondent paid claimant based on the number of square feet of bricks laid and not by the number of hours worked. No federal or state taxes were deducted from the payment. Claimant employed a helper, and claimant was responsible to pay the helper from the proceeds received from respondent. Claimant worked from blueprints that showed the pattern in which the bricks were to be laid. But because this was claimant's first experience laying brick, respondent's project manager did show claimant how to lay the bricks to achieve the proper water drainage. This is the only evidence in the record of respondent supervising claimant's work.

The Appeals Board finds claimant was under little or no supervision or control by respondent; was only concerned with the final result, i.e., the proper laying of the brick sidewalk; was not an employee, but instead an independent contractor.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's February 16, 2000, preliminary hearing Order, wherein the claimant was found to have failed to prove he was an employee of the respondent, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
Donald J. Fritschie, Overland Park, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director