

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MICKY SAUNDERS)	
Claimant)	
V.)	
)	AP-00-0461-658
THREE D TRUCKING, LLC)	CS-00-0444-365
Uninsured Respondent)	

ORDER

Claimant requested review of the October 8, 2021, Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on February 10, 2022.

APPEARANCES

John G. O'Connor appeared for Claimant. Matthew M. Hogan appeared for uninsured respondent.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of the Regular Hearing held June 3, 2021; the transcript of the discovery deposition of Mickey Saunders taken April 8, 2021, with exhibits attached; the transcript of the evidentiary deposition of Mickey Saunders taken August 17, 2021, with exhibits attached; the transcript of the evidentiary deposition of Daniel D. Zimmerman, M.D., taken August 17, 2021, with exhibits attached, and the documents of record filed with the Division.

ISSUE

Was Claimant an independent contractor or respondent's employee at the time of his April 29, 2021, accident?

FINDINGS OF FACT

Respondent is a trucking company that obtains and delivers scrap metal. Claimant first began driving for respondent in 2013, shortly after finishing truck-driving school and earning his CDL. Claimant drove for respondent four different times over the years, taking breaks between stints for personal reasons. After such a break, in February 2019,

Claimant was approached by one of respondent's employees while shopping and offered a job. Claimant agreed to return to work and completed paperwork dated February 18, 2019. Claimant testified he was not provided any paperwork the first two times he worked for respondent, though the working conditions remained the same each time.

The aforementioned paperwork labels Claimant as an independent contractor. The agreement states either party can terminate the agreement with or without cause at any time. However, if Claimant did not give notice of termination two weeks prior, he would forfeit his final paycheck. Claimant agreed to pay \$100.00 if he did not stay with respondent for a period of 90 days. The agreement stated Claimant was required to maintain Occupational Accident Insurance, written through respondent's insurance and deducted from Claimant's pay. Claimant stated he was responsible for respondent's insurance deductible if any truck damage was his fault.

Claimant considered himself working full-time for respondent because he generally worked five days per week. Claimant understood respondent did not guarantee a specific number of loads per week. Respondent did not withhold anything from Claimant's pay, other than the accident insurance payment, and provided Claimant with a 1099 for tax purposes. Respondent did not provide health insurance.

Claimant did not personally own a truck or trucking business. Respondent provided the truck and trailer. Respondent provided fuel for the truck and paid for necessary maintenance. Claimant was not allowed to use the truck for anything other than respondent's jobs. Even though this prohibition does not appear in the written agreement, Claimant understood he could not work for other companies while working for respondent. Claimant worked for other trucking companies in the past decade, but did not specify when, other than it was prior to 2019.

Respondent paid Claimant a flat rate of \$0.38 per mile. Respondent informed Claimant when a load was ready to be picked up, where to pick up the load, and what time to arrive. After he acquired a load, Claimant was told by respondent where to deliver. Claimant stated he could choose which route to drive, but respondent made it clear the shortest route was preferable to save fuel. Claimant testified he was required to pay the difference in fuel if it were determined he did not take a satisfactory route. Claimant only drove the truck and did not load or unload trailers. He could be paid extra if he were made to wait an overly long time for a load, which was a rare occurrence.

Claimant could choose not to work, but would not be paid. The written agreement said Claimant was required to give two-weeks' notice to guarantee time off, and any request given less than one week prior would not be considered. Claimant was required to complete daily paperwork and turn it in to respondent every Friday. Claimant was responsible for his paperwork, and if it was lost due to his negligence, he was responsible for all expenses.

Claimant was required to be DOT compliant at all times. This included taking mandatory breaks according to federal guidelines. Claimant could choose when he took his breaks within those limits.

On April 29, 2021, Claimant was involved in a motor vehicle accident when his truck and trailer tipped onto its side on an exit ramp and slid into a large pole. He initially lost consciousness. Claimant was pinned by the steering wheel and had to force it up with his hand to free himself. Claimant was taken via ambulance to a hospital in Overland Park, Kansas, with primary complaints of abdominal and neck pain. Claimant was released to seek treatment nearer to his home in St. Joseph, Missouri.

Claimant developed pain and knots in his right hand, which he attributed to moving the steering wheel after the accident. Claimant also had pain in his right knee near where he believed he was struck by the steering wheel. He treated conservatively with his primary physician and underwent an electrodiagnostic study on November 22, 2019, which showed evidence of right carpal tunnel syndrome. On January 10, 2020, Dr. Corey Trease performed a right carpal tunnel release, a right hand Dupuytren's excision, and trigger releases of the ring and long fingers.

Dr. Daniel Zimmerman examined Claimant at his counsel's request on October 30, 2020. Dr. Zimmerman reviewed Claimant's history, medical records, and performed a physical examination. Dr. Zimmerman found Claimant sustained chronic cervical paraspinal musculature myofascitis, residuals of the surgically-treated right carpal tunnel syndrome, residuals of a Dupuytren's contracture affecting the third and fourth digits of the right hand, and a chronic strain/sprain affecting the hamstring insertion at the right knee as a result of the accident. Using the *AMA Guides*,¹ Dr. Zimmerman opined Claimant sustained a combined 9 percent impairment to the body as a whole. Dr. Zimmerman also testified Claimant's medical expenses, totaling \$106,974.26, were reasonable and a result of the April 2019 accident.

Claimant has not worked since the accident. Claimant did not think he was physically capable of returning to his job with respondent because he cannot grip with his right hand. Claimant continues to have complaints involving his neck, right upper extremity, and right lower extremity.

The ALJ found Claimant to be an independent contractor, rather than respondent's employee, and denied benefits.

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues he was respondent's employee for purposes of the Kansas Workers Compensation Act and is entitled to benefits. Claimant contends he suffered 9 percent permanent partial impairment to the whole body as a result of the accident. Further, Claimant argues he is entitled to compensation for his accident-related medical expenses.

Respondent maintains the ALJ's Award should be affirmed. Respondent argues Claimant had complete control over the work to be done and enjoyed an independent contractor relationship.

K.S.A. 2020 Supp. 44-501b(c) states:

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. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2020 Supp. 44-508(h) states:

"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 unless a higher burden of proof is specifically required by this act.

It is often difficult to determine in a given claim whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.²

There is no absolute rule for determining whether an individual is an independent contractor or an employee.³ The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.⁴

² See *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

³ See *Wallis v. Sec'y of Kansas Dep't of Human Resources.*, 236 Kan. 97, 102, 689 P.2d 787 (1984).

⁴ See *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

The primary test used by the courts in determining whether the employer/employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.⁵

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

- (1) The existence of a contract to perform a piece of work at a fixed price.
- (2) The independent nature of the worker's business or distinct calling.
- (3) The employment of assistants and the right to supervise their activities.
- (4) The worker's obligation to furnish tools, supplies and materials.
- (5) The worker's right to control the progress of the work.
- (6) The length of time the employee is employed.
- (7) Whether the worker is paid by time or by job.
- (8) Whether the work is part of the regular business of the employer.⁶

In *Hill*, the Court of Appeals stated the court primarily applied the "right to control" test, but generally considered several additional factors, including:

- (1) [t]he existence of the right of the employer to require compliance with instructions;
- (2) the extent of any training provided by the employer;
- (3) the degree of integration of the worker's services into the business of the employer;
- (4) the requirement that the services be provided personally by the worker;
- (5) the existence of hiring, supervision, and paying of assistants by the workers;
- (6) the existence of a continuing relationship between the worker and the employer;
- (7) the degree of establishment of set work hours;
- (8) the requirement of full-time work;
- (9) the degree of performance of work on the employer's premises;
- (10) the degree to which the employer sets the order and sequence of work;
- (11) the necessity of oral or written reports;
- (12) whether payment is by the hour, day or job;
- (13) the extent to which the employer pays business or travel expenses of the worker;
- (14) the degree to which the employer furnishes tools, equipment, and material;
- (15) the incurrence of significant investment by the worker;

⁵ *Wallis, supra*, at 102-03; citing *Jones, supra*, at 780.

⁶ See *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

- (16) the ability of the worker to incur a profit or loss;
- (17) whether the worker can work for more than one firm at a time;
- (18) whether the services of the worker are made available to the general public;
- (19) whether the employer has the right to discharge the worker; and
- (20) whether the employer has the right to terminate the worker.⁷•

Respondent maintained the right to control almost every aspect of Claimant's work activity. Respondent provided the truck Claimant drove and paid for all of its related expenses. Respondent controlled the loads Claimant would haul and the schedule upon which the loads were to be delivered. The work Claimant performed was an integral part of respondent's commercial truck operations.

Other facts also tend to show that Claimant was an employee of respondent, including:

- Claimant considered himself a full-time employee;
- Claimant and respondent had an ongoing relationship similar to that of an employer and employee;
- There was no contract to perform a specific piece of work at a fixed price;
- Claimant did not hold himself as a separate business entity or trucking company, or conduct business separate and apart from driving respondent's truck;
- Claimant was not allowed to use the company truck to take on other jobs;
- Claimant was not obliged to provide repairs to the truck he drove or provide any tools, materials, or supplies.

Of particular significance, there is a provision in the contract that required Claimant to provide two-weeks' notice if he wanted to take time off. This strongly suggests an employment relationship, rather than an independent contractor relationship. Another provision in the contract suggesting an employer/employee relationship states if Claimant did not stay with respondent for more than 90 days, Claimant's final check would be reduced by \$100.00. Respondent could fire Claimant. Respondent controlled Claimant's employment.

⁷ *Hill v. Kansas Dep't of Labor, Div. of Workers Comp.*, 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 [2009] *aff'd in part, rev'd in part*, 292 Kan. 17, 248 P.3d 1287 [2011].

The control over which Claimant could assert at his discretion was limited to the route he chose and when he took his break. When considering the entire record, the Board finds and concludes claimant was an employee of respondent at the time of his April 2021 accident.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated October 8, 2021, is reversed and remanded for a determination of the nature and extent of Claimant’s disability, temporary total disability compensation, hospital and medical expenses, unauthorized medical, future medical treatment, and other issues not addressed by the ALJ in his Order. Such determination shall be made based on the record existing at the time this appeal was made.

IT IS SO ORDERED.

Dated this _____ day of March, 2022.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

John G. O'Connor, Attorney for Claimant
Matthew M. Hogan, Attorney for Respondent
Hon. Kenneth J. Hursh, Administrative Law Judge