BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JESUS QUINONES
Claimant
v.

AP-00-0464-520
CS-00-0461-921

GEM TRANSPORT LLC
Uninsured Respondent

and

KANSAS WORKERS COMPENSATION FUND

ORDER

Claimant requests review of the March 25, 2022, preliminary Order issued by Administrative Law Judge (ALJ) Pamela J. Fuller.

APPEARANCES

Brian D. Pistotnik appeared for Claimant. Shirla R. McQueen appeared for Uninsured Respondent. Kathryn Gonzalez appeared for the Kansas Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The Appeals Board adopted the stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing held March 23, 2022, including Exhibits 1-6; the transcript of Preliminary Hearing by Evidentiary Deposition via Video Conference of Jesus Quinones, including Exhibits 1-4, after overruling all objections; the transcript of Preliminary Hearing by Evidentiary Deposition via Video Conference of Misleydi Guadarrama, including Exhibits 1-3, after overruling all objections except the objection made on pages 31-32, which is sustained; and the pleadings and orders contained in the administrative file. The Board also reviewed the briefs filed by Claimant and Respondent.

ISSUES

1. Does the Appeals Board possess authority to consider Claimant's application for review under K.S.A. 44-534a?

2. Is Claimant barred from obtaining workers compensation benefits from Respondent under K.S.A. 44-503c?

3. Did the employment relationship exist between Claimant and Respondent on October 20, 2021?

4. Is Claimant entitled to a preliminary award of medical benefits and temporary total disability compensation?

FINDINGS OF FACT

Claimant worked as a truck driver intermittently since 1979. Respondent enters into lease agreements with owner-operators of commercial trucks to drive interstate loads of commodities under Respondent's DOT authority. Respondent receives commodity delivery work from brokers, and passes those jobs to the owner-operators. Respondent receives payment from the broker, and a portion of the payment is passed to the owner-operator.

Claimant learned from an advertisement on Facebook about a job driving trucks for Respondent. Claimant thought Respondent placed the advertisement, which instructed potential applicants to contact Denis Gonzales. Mr. Gonzales has a lease agreement as an owner-operator with Respondent.

Claimant contacted Mr. Gonzales, and they met in person in Liberal. Mr. Gonzales and Claimant discussed the job, which involved interstate trucking. Mr. Gonzales provided Claimant a tractor to drive. Mr. Gonzales and his wife told Claimant which routes to drive. Claimant was paid a portion of the compensation Mr. Gonzales received from Respondent. Claimant accepted the job offer extended by Mr. Gonzales. Respondent was not involved in the hiring process. Claimant thought he was working for Mr. Gonzales, and only drove routes dispatched by Mr. Gonzales or his wife.

After Claimant accepted the job offer, he went to Respondent's office in Garden City. Claimant completed paperwork confirming his qualifications for a company named "Baruca Trucking." Baruca Trucking was owned by Respondent, did not engage in actual trucking activities, and collected paperwork concerning the qualifications of drivers. While at Baruca Trucking, Claimant signed a document called "Insurance & Safe Driving Policy," which reviewed Respondent's safety policies, stated Claimant was an employee of Respondent, and stated Respondent would not provide Claimant workers compensation insurance coverage. After completing the paperwork, Claimant confirmed his start date.

After Claimant started driving, his only contact with Respondent was leaving documents confirming his deliveries and receiving his pay checks in a mailbox. Respondent paid Claimant and Mr. Gonzales separately for the deliveries Claimant made

because Mr. Gonzales was driving other routes and was not available to pay Claimant directly. Respondent paid Claimant weekly with no taxes withheld.

On October 20, 2021, Claimant delivered a load contracted by Respondent and dispatched by Mr. Gonzales. Mr. Gonzales directly contracted with a broker to transport another load in Nebraska. Mr. Gonzales told Claimant to travel to Nebraska to pick up the load. En route to Nebraska, Claimant stopped at a truck stop in St. Joseph, Missouri. Claimant's truck became stuck in the ground. Claimant got out of the truck to investigate. Claimant put his hand on a wheel he did not see was turning. The wheel pulled in Claimant's arm and caused Claimant to fall to the ground. Claimant sustained a laceration to the left eyelid and right shoulder pain. Claimant notified Mr. Gonzales of the accident, but he did not contact Respondent because he did not believe he was Respondent's employee.

Claimant was transported by ambulance to the hospital in St. Joseph, and was transferred to the University of Kansas Hospital. Claimant underwent surgery by Dr. Sokol on the left eyelid to repair the laceration and to install a drainage tube. X-rays of the right shoulder revealed no acute fracture or dislocation. Claimant was released from the hospital on October 22, 2021, and restricted from driving while taking pain medication or until released to drive at a follow-up appointment.

Claimant attended a follow-up appointment with Dr. Sokol on November 1, 2021. Dr. Sokol completed a work status form, dated November 4, 2021, stating Claimant was unable to work from October 20 through November 1, 2021. Claimant was referred to Fry Eye Associates for further treatment. Claimant attended a follow-up appointment at Fry Eye Associates on November 8, 2021, and sutures were removed. Claimant's work status was not addressed. Claimant also saw Dr. Garcia at Siena Medical Clinic for an unrelated left shoulder condition on December 9, 2021. Claimant told Dr. Garcia he injured his face and right shoulder in a motor vehicle accident, and his right shoulder pain resolved.

Claimant did not resume driving a truck after October 20, 2021. Claimant did not feel comfortable driving because of eye blurriness and tearing. Claimant testified his right shoulder still hurts and pops. Claimant wants additional treatment for his left eye and right shoulder, as well as payment of past medical expenses. Claimant is seeking reimbursement for a hotel stay by Satrina Quinones on October 21, 2021, as a medical expense.

Misleydi Guadarrama, the majority owner of Respondent, confirmed it contracts with brokers to transport commodities via interstate trucking. Respondent does not own tractors, and enters into lease agreements with owner-operators of tractors, who transport commodities in trailers owned by Respondent. When an owner-operator is available to transport goods, Respondent obtains a job from a broker and passes the job to the owner-operator for completion. Respondent did not dispatch Claimant. Respondent does not

consider the owner-operators to be employees. Respondent operates under a license granted by the federal Department of Transportation, and provides liability insurance pursuant to federal law. Respondent, however, does not provide workers compensation insurance to the drivers. Respondent does not have workers compensation insurance coverage, itself, and does not have sufficient assets to pay an award of compensation. Therefore, the Fund was impled.

Following a preliminary hearing held on March 23, 2022, ALJ Fuller issued the preliminary Order denying Claimant's request for benefits. ALJ Fuller ruled Claimant was barred from seeking benefits under K.S.A. 44-503c because he was an owner-operator of a vehicle involved in interstate commerce. ALJ Fuller also found Claimant was not an employee of Respondent, but was an employee of Mr. Gonzales. The request for payment of compensation by Respondent was denied. These review proceedings follow.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the Order is erroneous because K.S.A. 44-503c does not apply and because Respondent was Claimant's employer under Kansas law and federal regulations. Claimant asks the Board to remand this matter to ALJ Fuller with instructions to issue an award of compensation. Respondent argues the existence of an employment relationship is not an appealable issue under K.S.A. 44-534a, Claimant is barred from seeking compensation as an owner-operator under K.S.A. 44-503c, and Claimant was not Respondent's employee.

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.[1] The provisions of the Workers Compensation Act shall be applied impartially to all parties.[2] The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.[3]

1. The Appeals Board possesses authority to consider Claimant's application for review under K.S.A. 44-534a.

Respondent argues the Appeals Board does not possess jurisdiction under K.S.A. 44-534a to consider whether the employment relationship exists between Claimant and

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[1] *See* K.S.A. 44-501b(a).

[2] *See id*.

[3] *See* K.S.A. 44-501b(c).

Respondent. Under the Workers Compensation Act, the Appeals Board possesses authority to review preliminary findings of whether an employee suffered an accident, repetitive trauma or injury; whether the injury arose out of and in the course of employment; whether notice was given or whether certain defenses apply.[4] "Certain defenses" are defenses pertaining to the compensability of a claim.[5] "The issue as to whether an employer-employee relationship exists clearly involves a determination regarding the compensability of the claim and would come under the heading of 'certain other defenses.'"[6] Thus, the Board possesses the authority to review the preliminary findings regarding the alleged employment relationship.

2. Claimant is not barred from seeking compensation from Respondent under the plain language of K.S.A. 44-503c.

The Board next addresses whether Claimant is barred from seeking workers compensation benefits against Respondent under K.S.A. 44-503c. The Workers Compensation Act states an individual who is an owner-operator and the exclusive driver of a motor vehicle leased or contracted to a licensed motor carrier shall not be considered a contractor or employee of the licensed motor carrier, and the licensed motor carrier shall not be considered a principal or employer, if the owner-operator is covered by an industrial accident policy and is not treated as an employee under the terms of the lease agreement for purposes of the federal insurance contribution act, the federal social security act, the federal unemployment tax act and the federal statutes prescribing income tax withholding at the source.[7] "Owner-operator" means an individual who is the owner of a single motor vehicle driven exclusively by the owner under the lease agreement.[8] The Board previously ruled the plain language of K.S.A. 44-503c does not apply to a driver who is not the owner in possession of the title to the vehicle, or who is not covered by an industrial accident policy.[9]

In this case, it is undisputed Claimant is not the owner of the truck he was driving on October 20, 2021. It appears Mr. Gonzales owned the truck. Under the plain language

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[4] *See* K.S.A. 44-534a(a)(2).

[5] *See Munoz v. Becerra Constr., Inc.*, No. 1,010,583, 2003 WL 22401228, at *1 (Kan. WCAB Sept. 30, 2003) (citing *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999)).

[6] *Munoz*, 2003 WL 22401228, at *1.

[7] *See* K.S.A. 44-503c(a)(1).

[8] *See* K.S.A. 44-503c(a)(2)(C).

[9] *See Galvan v. S & S Trucking, et al.*, No. 1,060,043, 2012 WL 6101124, at *4 (Kan. WCAB Nov. 4, 2012).

of K.S.A. 44-503c(a)(2)(C), Claimant cannot be an owner-operator because he did not own the truck. Therefore, K.S.A. 44-503c does not bar Claimant from seeking workers compensation benefits from Respondent. Claimant, however, still has the burden of proving all the elements of his claim against Respondent.

3. The employment relationship between Claimant and Respondent did not exist on October 20, 2021, and the request for compensation should be denied.

The Board next considers whether the employment relationship existed between Claimant and Respondent on October 20, 2021. Claimant alleges he was a direct employee of Respondent, which Respondent disputes. Claimant did not allege at the preliminary hearing, or in his brief, Respondent is a statutory employer. Therefore, the Board limits its review to whether Claimant proved he was a direct employee of Respondent. Mr. Gonzales is not a party to these proceedings.

"Employee" means any person who entered into the employment of or works under any contract of service or apprenticeship with an employer. Absent a valid election, "employee" does not include individual employers, limited liability company members, partners or self-employed persons.[10] The main test to determine whether an employer-employee relationship exists is whether the alleged employer has the right to control, supervise and direct the alleged employee's work.[11] It is not the actual interference or exercise of control, but the right's existence, determining whether one is an employee or an independent contractor.[12] Each case is determined on individual facts and circumstances.[13] Other factors to consider, apart from the right to control, include the employer's right to require compliance with instructions; employer-provided training; integration of the worker's services into the employer's business; requiring the worker to perform services personally; the worker's hiring, supervising and paying of assistants; the existence of a continuing relationship between the worker and employer; set working hours; the existence of full-time work; the degree of work performed on the employer's premises; the degree the employer sets the order and sequence of work; the necessity of oral or written reports; whether the worker is paid by the hour, day or job; whether the employer pays business or travel expenses; whether the employer provides tools, equipment and materials; whether the worker incurs a significant investment; the ability of the worker to incur a profit or a loss; whether the worker can work for more than one firm at a time;

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[10] *See* K.S.A. 44-508(b).

[11] *See Leighty v. Derailed Commodity*, No. 1,057,582, 2012 WL 5461469, at *4 (Kan. WCAB Oct. 25, 2012) (citing *Falls v. Scott*, 249 Kan. 54, 64, 815 P.2d 1104 (1991)).

[12] *See id*.

[13] *See id*.

whether the worker's services are available to the general public; whether the employer has the right to discharge the worker and whether the employer has the right to terminate the worker.[14]

Based on the greater weight of the evidence, Respondent did not possess the right to control how Claimant performed his work. Respondent did not interview or hire Claimant, and Respondent did not dispatch Claimant or assign Claimant work. Claimant only contacted Respondent when he dropped off paperwork and picked up his pay check. According to Claimant, he was on his way to pick up a load contracted by Mr. Gonzales and another firm when the accident occurred. After the accident occurred, Claimant contacted Mr. Gonzales, and not Respondent, because he believed he worked for Mr. Gonzales. Claimant's behavior indicates Respondent did not have the right to control.

Looking beyond the right to control, some *Hill* factors are consistent with an employment relationship: Claimant and Respondent's agent executed a document stating Claimant was an employee, Respondent provided the trailer Claimant used to transport goods, and Respondent paid Claimant directly. Other factors from *Hill*, however, indicate Respondent was not Claimant's employer: Respondent did not provide training, set the order or sequence of work, establish a work schedule or require Claimant to work exclusively for them, and did not provide the tractor Claimant drove. Respondent did not withhold taxes, and paid Claimant directly because Mr. Gonzales also drove and was not available to pay Claimant. Claimant did not establish Respondent could fire or discipline him for failure to follow safety procedures. Claimant could work for other firms or employers, and may have been en route to pick up a load Mr. Gonzales arranged outside of his relationship with Respondent.

The bulk of the factors from *Hill* indicate Claimant was not Respondent's employee. Respondent did not have the right to control how Claimant performed his work. Therefore, Claimant did not prove Respondent was his employer on October 20, 2021.

Claimant also argues federal regulations created an employment relationship between Claimant and Respondent, notwithstanding Kansas law. Claimant cites 49 C.F.R. § 390.5, which is the definition section of regulations pertaining to the Federal Motor Carrier Safety Administration. This provision cited by Claimant concerns a licensed motor carrier's obligation to have liability insurance coverage for interstate commerce. This provision is distinguishable from the issue in this matter, which is the existence of an employment relationship under Kansas workers compensation law. The preliminary Order denying Claimant's request for benefits is affirmed.

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[14] *See id*. at *4-5 (citing *Hill v. Kansas Dep't of Labor*, 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 (2009), *aff'd in part and rev'd in part on other grounds*, 292 Kan. 17, 248 P.3d 1287 (2011)).

In the preliminary Order, ALJ Fuller states Mr. Gonzales was Claimant's employer. Mr. Gonzales was not named as a party in this matter. There is no evidence Mr. Gonzales received notice of these proceedings or was provided an opportunity to be heard at the preliminary hearing. "The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard in an orderly proceeding adapted to the nature of the case."[15] Finding Mr. Gonzales an employer without naming him as a party, or giving him notice and an opportunity to be meaningfully heard, violates due process. Accordingly, the finding Mr. Gonzales was the employer is vacated. Because these are preliminary proceedings, Claimant may later allege Mr. Gonzales is an employer. The Board does not address whether Mr. Gonzales is Claimant's employer at this time. The essential elements of due process, however, must be provided.

Because the Board concludes Claimant did not prove he was Respondent's employee, the issue of whether Claimant should be awarded medical benefits or temporary total disability compensation is moot.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Fuller, dated March 25, 2022, is modified. Claimant's request for benefits is denied because he did not prove he was an employee of Respondent. The provision of the Order stating Denis Gonzales is Claimant's employer is vacated.

IT IS SO ORDERED.

Dated this _____ day of May 2022.

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WILLIAM G. BELDEN
APPEALS BOARD MEMBER

c: Via OSCAR

Brian D. Pistotnik
Shirla R. McQueen
Kathryn Gonzalez
Hon. Pamela J. Fuller

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[15] *See Guerrero v. Denos Trucking*, No. 1,078,296, 2017 WL 6275623, at *6 (Kan. WCAB Nov. 7, 2017) (citing *Collins v. Kansas Milling Co.*, 207 Kan. 617, 485 P.2d 1343 (1971)).