

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GARY A. NELSON)	
Claimant)	
V.)	
)	
MID-STATES AUTO SALES, INC.)	AP-00-0459-141
Respondent)	CS-00-0456-049
AND)	
)	
AUTO OWNERS MUTUAL INS. CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (Respondent), through Bruce Levine, request review of Administrative Law Judge Ali Marchant's preliminary hearing Order dated July 9, 2021. Jordan Shaw appeared for Claimant.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the preliminary hearing transcript, held May 25, 2021, with attached exhibits; the deposition transcripts of Claimant and Steven Ayesh, held May 11, 2021; and the case file.

ISSUES

1. Do Claimant and Lester Leach have an employment relationship?
2. If an employment relationship exists between Claimant and Mr. Leach, is Claimant a statutory employee of Respondent, pursuant to K.S.A. 44-503(a)?

FINDINGS OF FACT

Respondent, a wholesale car company, purchases trade-in vehicles to sell to other dealers.¹ Steven Ayesh is the owner and one of two individuals authorized to buy vehicles. Upon purchase, every vehicle is insured through a blanket liability policy which is taped to the back of the license plate. Respondent utilizes transport companies and individual

¹ Ayesh Depo. at 6.

drivers to deliver vehicles. Mr. Ayesh testified the transport companies have access to Respondent's lot and are not required to deliver vehicles by a specific time. Upon delivery, the transport company submits a bill and is paid by check.

Mr. Ayesh testified Lester Leach is one of the people he works with to transport vehicles. They do not have a written contract. Mr. Ayesh testified Claimant is not an employee of Respondent. Claimant is paid based upon information sheets he gives to Mr. Leach who then forwards to Mr. Ayesh. He does not provide Mr. Leach the information sheets used. If a transport company or driver is unable to deliver a vehicle, Respondent contacts another transport company or driver.

Claimant denied being interviewed by Respondent prior to delivering vehicles. He testified he was already familiar with the owners, Mr. Ayesh and his wife, because he had previously worked for them when they owned an auto auction. He stated Ms. Ayesh asked him if he would drive cars for them. Claimant did not consider himself an employee of Respondent prior to the January 2, 2021, accident. He testified Respondent did not withhold any taxes from his check and provided him a 1099 tax form.

Claimant testified Mr. Leach is the head driver for Respondent. Mr. Leach spoke with Claimant about being on a team of drivers. Claimant provided a copy of his driver's license and filled out paperwork for Mr. Leach before he started driving vehicles. He denied having a formal written agreement with Mr. Leach.

Claimant testified Mr. Leach has multiple drivers. Mr. Leach never asked Claimant to deliver a vehicle for any company other than Respondent. Claimant stated there were times he would deliver vehicles for multiple companies, like Respondent and D & H Transportation (D & H), on the same day. Claimant denied receiving specific written instructions from Mr. Leach regarding how his job was to be performed other than not to speed. He testified Mr. Leach set the pay rates and assigned vehicles.

Claimant testified Mr. Leach typically called him on Saturday and sometimes during the week to see if he was available. He stated there were occasions when Mr. Leach contacted him about driving, but he declined because he was delivering for another company. Claimant explained Mr. Leach would transport the drivers to the drop-off location in a company car owned by Respondent. Upon arrival, Claimant was responsible for checking fluid levels and ensuring the vehicle started and had gas. He and the other drivers then followed Mr. Leach back to Respondent's location in a "train" format.² Claimant explained if someone needed to stop, they had to let Mr. Leach know so they could stay together. After delivery of the vehicle to Respondent's lot, Claimant was required to fill out paperwork and give it to Mr. Leach.

² Claimant Depo. at 33.

Claimant denied receiving any formal training from Mr. Leach or Respondent, stating "I'm fairly experienced."³ He testified Mr. Leach had authority to fire him, and he was aware of two drivers Mr. Leach had fired. He denied being responsible for any expenses and stated Mr. Leach had a credit card he used to purchase gas for the vehicles. Claimant was unaware if Mr. Leach had any kind of company name.

On January 2, 2021, Claimant met with Mr. Leach and another driver, Sheldon Gillespie, at Respondent's location. He parked his personal truck in Respondent's lot. Mr. Leach drove Claimant and Mr. Gillespie to Hutchinson to pick up vehicles. On the final run that day, it started freezing rain. Claimant delivered the vehicle to Respondent's lot, took off the license plate and dropped the key in the mailbox. Mr. Gillespie then suggested Claimant warm up his truck and move it closer to the office to finish up paperwork. He went back to his truck, but was unable to move it because there were too many cars. The side mirror was covered in ice and the area was dark. Claimant stepped out of his truck to wipe off the side mirror, when his left leg flew out from under him and his right leg was in the truck. The fall pulled him out of the truck, his right leg got twisted, and landed on the ice. Claimant felt excruciating pain immediately and was taken to the hospital by ambulance. Claimant sustained injuries to his right leg and hip. Surgery was performed to repair the injury to his right leg. He was in the hospital for approximately three days, followed by a rehabilitation hospital for three and a half weeks. Claimant was released to return to work on April 10, 2021. He continues to experience pain in his right leg, but stated it is improving.

Claimant only performed two deliveries for Respondent since his accident. He primarily works for D & H. Claimant explained he drives four to five days a week for D & H and receives \$.20 per mile, plus reimbursement of any gas or tolls. Claimant is paid weekly and they do not withhold taxes.

Claimant also drove for Discount Auto Sales (Discount Auto). He was paid a flat fee by the job for Discount Auto. He has done so for approximately three years. He has not driven for Discount Auto since his accident.

The ALJ, in rendering her ruling, stated:

In the present case, although Claimant did not have any paperwork that set forth or controlled his relationship with Mr. Leach, the evidence supports a finding that Mr. Leach had the right of control and supervision over the work Claimant did when he transported cars for Respondent. Mr. Leach dictated the procedure Claimant was to follow when he would get in the cars, and Mr. Leach would drive Claimant to the location of the cars and assign Claimant the cars he would drive back. Mr. Leach required all of the drivers to stay in a convoy or train with Mr. Leach when

³ *Id.* at 28.

they would transport the cars back to Respondent's lot, and if Claimant needed to stop for any reason, he had to ask Mr. Leach so that everyone in the group could stop and stay together.

Mr. Leach also performed some kind of background check on Claimant before Claimant started driving for him, and Mr. Leach specifically negotiated the rates at which Claimant would be paid by Respondent for each delivery. Mr. Leach created the paperwork he required Claimant to complete when he delivered each car, and Claimant testified that Mr. Leach had the ability to fire him, as Mr. Leach had previously fired two other drivers. Additionally, the vehicles that Claimant rode in to pick up cars or if he had to drive a tow truck were provided by Mr. Leach and Respondent rather than Claimant, and Mr. Leach provided Claimant with a credit card to use for fuel expenses. Based upon the foregoing, the Court finds that Claimant was an employee of Mr. Leach when he was doing deliveries for Respondent rather than an independent contractor.

There is no evidence that Mr. Leach had workers compensation insurance, and Claimant argues that Claimant was a statutory employee of Respondent pursuant to K.S.A. 44-503. . . .

The Kansas Court of Appeals observed in *Robertson v. Bayer CropScience AG*, No. 107,669, 2013 WL 452162, at *3 (Feb. 1, 2013) that the determination of whether or not work is part of the principal's "trade or business" as contemplated by K.S.A. 44-503(a) depends on answers to the following questions:

"(1) [I]s the work being performed by the independent contractor and the injured employee necessarily inherent in and an integral part of the principal's trade or business? (2) is the work being performed by the independent contractor and the injured employee such as would ordinarily have been done by the employees of the principal?"

(quoting *Hanna v. CRA, Inc.*, 196 Kan. 156, 159-60 (1966)). The Board has noted that courts must look to the activities of similar employers in order to determine whether the work being performed is an integral part or inherent in the principal's trade or business. *Anderson v. David Craig*, No. 1,020,470, 2005 WL 1983414 (Kan. W.C.A.B. 2005). Although many of the cases apply the first test, the second test also applies, and an affirmative answer to either test satisfies the provisions of K.S.A. 44-503(a). *Rodriquez v. John Russell Const.*, 16 Kan. App. 2d 269, 273 (1991).

In the present case, Mr. Leach's employees, including Claimant, worked as a subcontractor for Respondent, transporting cars Respondent purchased from the sellers to Respondent's lot. Respondent is a wholesale car dealer that buys cars from various sellers and then reconditions them and sells them to other people on

its lot. Respondent's insurance coverage on the cars took effect as soon as the sale was completed before the cars were transported to Respondent's lot. Thus, transporting the cars to Respondent's lot was a necessity for Respondent to recondition the cars and sell them to its customers from its lot. The Court finds that Respondent's act of transporting cars it has purchased to its lot in order to sell them is an integral and necessary part of Respondent's trade or business. As such, the Court finds that Respondent was Claimant's statutory employer at the time of Claimant's accident.

Respondent argues that even if Respondent was a statutory employer that Claimant's injuries are not compensable because Mr. Leach did not have sufficient payroll for Claimant's employment to fall within the coverage of the Act. However, because Respondent is a statutory employer, Claimant's employment falls within the coverage of the Act so long as the statutory employer has sufficient payroll. See *Laster v. AB Plumbing*, No. 1,044,841, 2011 WL 1747819 (Kan. W.C.A.B. April 13, 2011). No assertions have been made that Respondent did not have sufficient payroll to fall within the coverage of the Act.

Because Claimant was a statutory employee of Respondent and met with personal injury by accident on January 2, 2021, arising out of and in the course of that employment, Claimant is entitled to workers compensation benefits related to his injuries. Respondent is ordered to pay as authorized medical treatment all necessary and related medical bills associated with the treatment of Claimant's work-related injuries pursuant to the Kansas Workers Compensation Fee Schedule.

Respondent argues Claimant has failed to prove he was an employee of Leach and a statutory employee of Respondent. Claimant maintains the Order should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

Claimant's employment status is the main issue before the Board. Specifically, is Claimant an employee of Leach, and if so, is he a statutory employee of Respondent. The undersigned Board Member agrees with the well-reasoned analysis and result of the ALJ's rulings on these two issues.

Respondent argues the ALJ erred in finding Claimant was an employee of Leach because Leach did not have the right to control and did not supervise Claimant's work. In support of their position, Respondent argues correctly the ALJ erroneously found Leach ran a background check and provided Claimant with a credit card. These are minor errors which by themselves, are not determinative of Leach's right to control Claimant while in the course of transporting vehicles to Respondent's car lot. The greater weight of the evidence supports the ALJ's finding Leach had control over Claimant and supervised him throughout the transporting process.

Respondent argues the ALJ erred in finding Claimant was a statutory employee of Respondent because Claimant failed to prove transporting cars to Respondent's lot was inherent in and an integral part of Respondent's trade or business. In support of their position, Respondent argues Claimant failed to present any evidence establishing similar used car dealers use employees to transport cars. Respondent's argument is unpersuasive in light of Claimant's testimony he transported cars for two other dealerships: D & H and Discount Auto.

The ALJ's decision is well-reasoned and adopted by the Board. Simply put, the greater weight of the credible evidence establishes Claimant was an employee of Leach and was a statutory employee of Respondent.

WHEREFORE, the Board affirms the result of the Order dated July 9, 2021.

IT IS SO ORDERED.

Dated this _____ day of September, 2021.

CHRIS A. CLEMENTS
BOARD MEMBER

c: (via OSCAR)
Jordan Shaw
Bruce Levine
ALJ Ali Marchant