

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KENNETH HIPP)	
Claimant)	
V.)	
)	AP-00-0461-294
DEE KING TRUCKING)	CS-00-0456-534
Respondent)	
AND)	
)	
UNKNOWN)	
Insurance Carrier)	

ORDER

Claimant appeals the September 14, 2021, preliminary hearing Order issued by Administrative Law Judge (ALJ) Pamela J. Fuller.

APPEARANCES

Phillip B. Slape appeared for Claimant. Kirby A. Vernon appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing taken September 8, 2021, with exhibits attached; Transcript of Preliminary Hearing by Deposition of Kenneth Hipp taken June 2, 2021, with exhibits attached; Evidentiary Deposition of Susan Wilson taken June 30, 2021, with exhibits attached; Evidentiary Deposition of Mary Barrientes taken June 30, 2021, with exhibits attached; Evidentiary Deposition of Patrick Lalor taken June 30, 2021, with exhibits attached; and the documents of record filed with the Division.

ISSUES

1. Does Kansas have jurisdiction over this claim?
2. If jurisdiction is present, is Claimant entitled to benefits pursuant to the Kansas Workers Compensation Act or is Claimant barred from receiving benefits under the doctrine of estoppel?

FINDINGS OF FACT

The parties agree Claimant's accident and injury, occurred in Kansas and is compensable. The issue is whether there is jurisdiction in Kansas to continue with this claim, or is Claimant bound by the contract he signed with Respondent regarding work injuries.

The ALJ found Kansas does not have jurisdiction over this claim and denied the request for benefits. The ALJ determined Claimant entered into a binding contract and exercised his rights under the contract by requesting and receiving benefits. Therefore any disputes between the parties should be handled under the contract by mediation and/or arbitration.

On October 26, 2020, Claimant was employed as an over-the-road truck driver with Respondent. Respondent provides interstate shipping services. Claimant was en route from Denver, Colorado, to Holcomb, Kansas to pick up a load to take to Amarillo, Texas. In Hamilton County, Kansas, just west of Syracuse, Kansas, Claimant was involved in a single vehicle accident, when his truck hit some ice. Claimant suffered multiple injuries including injuries to his low back, left side of his face, right shoulder and left eye.

Claimant was transported to Hamilton County Hospital. He was eventually transferred to Swedish Medical Center in Englewood, Colorado, where he was hospitalized for approximately eleven days and had several surgeries. Claimant's care was eventually transferred to Amarillo, Texas. Claimant has not returned to work.

Texas allows employers to be a non-subscriber under the Texas Workers Compensation Act and not provide workers compensation benefits to Texas employees. A non-subscriber is a company who has opted out of workers compensation in Texas and provides alternate means for covering work place injuries for their employees. Respondent is a non-subscriber under Texas law.

When Claimant became employed with Respondent he signed an agreement titled "Dee King Trucking, LP, Texas Employee Injury Benefit Plan" (The Plan). This plan provides a substitution for workers compensation benefits and states.

Generally, under the Plan, necessary medical treatment expenses are provided to participating employees for accidental, work related, on-the-job injuries, and under certain conditions disability, dismemberment and death benefits will be paid. The Plan pays these benefits without regard to the participating employee's fault or negligence and without the necessity of the participating employee proving that the Company or its employee was negligent. The Company pays the entire cost to provide benefits under, and to operate the Plan. Employees participating in the Plan

make no payments or payroll deductions to be eligible for Plan benefits and pay no deductible or co-pay amounts.¹

Respondent has voluntarily adopted The Plan² which is described as an occupational injury benefit plan under federal law. Dee King Trucking, LP is the Plan administrator and has full discretion to decide benefit claims. The Plan Administrator designated The Plan's Administrative Committee who decides coverage disputes between The Plan and the employee.

When Claimant became employed by Respondent, he signed various documents, including a document titled "Election of Plan, Alternative Dispute Resolution Agreement and Designation of Beneficiary". By his signature and agreement to this document, Claimant agreed to be eligible for the Comprehensive Benefits offered by Respondent in The Plan. Claimant agreed all disputes were subject to binding arbitration.³

After Claimant was injured on October 26, 2020, and applied for benefits under the Plan Claimant was paid \$850 per week in disability benefits. The record is not clear if Claimant is still receiving these weekly payments. Claimant received benefits under The Plan for a previous injury.

Claimant's medical bills were paid in accordance with The Plan. Claimant testified there were medical bills not paid. At the Preliminary Hearing Claimant submitted a list of medical bills which Claimant believes were not been paid.⁴ According to the third party administrator for The Plan, Assurance Resources, many of the bills listed on Claimant's Exhibit E were paid or never submitted for payment. According to Susan Wilson, who is handling this claim for Assurance, neither Claimant, nor anyone on Claimant's behalf, has contacted them about outstanding bills.

Claimant filed an application for hearing on February 22, 2021.

At the preliminary hearing held on September 8, 2021, Claimant requested temporary total benefits starting September 8, 2021, continuing medical treatment and payment of outstanding medical bills.

¹ Barrientes Depo., Ex. 2 at 1.

² The Plan references the agreement for disability/injury benefits between Claimant and Dee King Trucking.

³ Barrientes Depo., Ex. 3.

⁴ P.H. Trans., Cl. Ex. E.

As of June 2, 2021, Claimant was not receiving medical treatment, except for his right shoulder. Claimant needs physical therapy for his shoulder. Claimant believes he will need further treatment for his low back. Claimant was receiving weekly payments. Claimant was uncertain of the source. Claimant has received one collection notice for a medical bill. Claimant did not talk to his employer or the plan administrator about the outstanding bills. However, Claimant acknowledged for the most part medical bills have been paid. Claimant did not contact The Plan for additional medical treatment.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues the ALJ erred in not finding Kansas has jurisdiction. K.S.A. 44-506 only excludes application of the Act to businesses so engaged in interstate commerce as to not be subject to the legislative powers of the state where injury occurs outside the boundaries of the state of Kansas. Alternatively, Claimant asserts that preemption under the Federal Arbitration Act does not apply to the provisions of the Kansas Workers Compensation Act and respectfully requests the Board find the same.

Respondent argues Claimant's request for benefits under then Kansas Workers Compensation Act should be denied, as Kansas does not have jurisdiction over the matter. In the alternative, Claimant is contractually estoppel from claiming any benefits under the Workers Compensation Act as he has already collected benefits under The Plan and is bound by that contract, which states the Federal Arbitration Act controls disputes in this matter. Therefore, the Board should affirm the ALJ's Order denying benefits.

The dispute in this case centers around whether The Plan provided by Respondent bars Claimant from claiming and receiving workers compensation benefits in accordance with Kansas law.

But for The Plan, Claimant has compensable claim in Kansas.

Respondent is a Texas employer and in Texas employers can be non-subscribers to the workers compensation system. Respondent provides benefits to employees for accidental, work-related on-the-job injuries under The Plan pursuant to Texas law.

However employees, like Claimant covered under The Plan are barred from seeking workers compensation benefits elsewhere, and are subject to dispute resolution under The Plan, including binding arbitration.

K.S.A. 44-505(a) provides:

Subject to the provisions of K.S.A. 44-506 and amendments there to, the workers compensation act shall apply to all employments where in employers employ employees within this state . . .

There are exceptions such agricultural employment, employers with less than \$20,000 of gross annual payroll, firefighters and real estate agents.

K.S.A. 44-506 provides:

The workmen's compensation act shall not be construed to apply to business or employment which, according to law, is so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while so engaged: Provided, That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides: Provided, however, That the workmen's compensation act shall apply to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of the state of Kansas and to all projects, buildings, constructions, improvements and property belonging to the United States of America within said exterior boundaries as authorized by 40 U.S.C. 290, enacted June 25, 1936.

K.S.A. 44-501b(a) states:

It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

Respondent argues The Plan bars Claimant from claiming and receiving Kansas workers compensation benefits. Respondent cites *Shields v. K.A.T. Transportation*.⁵ The Kansas Court of Appeals held the worker's injury, sustained in Ohio, was not subject to the Kansas Workers Compensation Act. The worker signed documents in Indiana, at the time he was hired as long-haul trucker by an Indiana trucking company stating, Indiana workers compensation law applied.

The facts in *Shields* are distinguishable from this case because Claimant sustained an injury in Kansas and the agreement allegedly barring Claimant from receiving Kansas workers compensation benefits limits Claimant to a private benefit plan and not benefits from another state's workers compensation coverage.

The Plan also limits Claimant to resolving any disputes under The Plan via binding arbitration after a dispute resolution process with The Plan Administrative Committee. This provision calls into question fairness and right to be heard for the employee.

⁵ *Shields v. K.A.T. Transportation*, 30 Kan. App. 2d 1069, 53 P.3d 1242 (2002).

K.S.A. 44-543(b) states:

Any employee of a corporate employer who owns 10% or more of the outstanding stock of such employer, may file with the director, prior to injury, a written declaration that the employee elects not to accept the provisions of the workers compensation act, and at the same time, the employee shall file a duplicate of such election with the employer. Such election shall be valid only during the employee's term of employment with such employer. Any employee so electing and thereafter desiring to change the employee's election may do so by filing a written declaration to that effect with the director and a duplicate of such election with the employer. Any contract in which an employer requires of an employee as a condition of employment that the employee elect not to come within the provisions of the workers compensation act, shall be void. Any written declarations filed pursuant to this section shall be in such form as may be required by regulation of the director.

This statute was interpreted by the Kansas Court of Appeals in the *Shields* case.⁶ The Court limited the application of the statute to employees who own 10% or more of the outstanding stock of a corporate employer.

Shields was decided prior to *Bergstrom v. Spears Manufacturing*. In that case the Kansas Supreme Court enunciated the principle one is required to apply the plain meaning of the statute in statutory construction.⁷ A plain reading of the statutory language takes it out of the stock ownership limitation. When reading this statute, all the statutory language in this section appears to limit owners of corporate stock until the next to the last sentence, which begins with the "Any contract in which an employer requires of an employee". There is no limitation or specific reference to ownership of corporate stock, it simply says "Any contract in which an employer."

The Plan, which Respondent claims bars Claimant from Kansas workers compensation benefits, is void under the provisions of this statute. Respondent cannot bind Claimant to contract or agreement which prohibits Claimant from coming under the provisions of Kansas workers compensation law. For these reasons, it is found Claimant is not barred by Respondent's benefit plan from filing for Kansas workers compensation benefits. Kansas has jurisdiction to decide Claimant's entitlement to workers compensation benefits.

This Board Member next considers whether Claimant is estopped from receiving workers compensation benefits. Claimant has claimed and received benefits under The Plan. Claimant has had medical bills paid and received weekly benefits from The Plan.

⁶ *Id.* at 1076.

⁷ *Bergstrom v. Spears Manufacturing*, 289 Kan. 605, 214 P.3d 676 (2009).

Claimant may still be receiving weekly benefits and provided medical benefits. Claimant's action in claiming benefits under The Plan for his injury bars him for asserting his right to Kansas workers compensation benefits under the doctrine of equitable estoppel.

Equitable estoppel is the effect of the voluntary conduct, whereby one is precluded both at law and in equity from asserting rights against another person relying on such conduct.⁸ "The policy underlying equitable estoppel is "it would be unconscionable to allow a person, to maintain a position inconsistent with one in which he or she accepted a benefit."⁹

In this case, Claimant received benefits under The Plan by stating he was bound by the agreement. Claimant now asserts he is not bound by this agreement after receiving the benefits of this agreement. Allowing Claimant to receive Kansas workers compensation benefits from the same employer he claimed and received benefits under The Plan, which provides the same or similar benefits as Kansas worker compensation benefits, is improper and lacks fundamental fairness. Moreover, Claimant's conduct could result in duplication of benefits. For these reasons, it found Claimant is estopped from receiving Kansas workers compensation benefits.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order was determined by only one Board Member, as permitted by K.S.A. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller, dated September 14, 2021, is modified. Kansas has jurisdiction over the claim, but Claimant is estopped from receiving Kansas workers compensation benefits.

⁸ *Steckline Communications, Inc. v. Journal Broadcasting Group of Kansas, Inc.*, 305 Kan. 761, 381 P.3d 84 (2017).

⁹ 28 Am. Jur. 2d Sec. 60 Estoppel and Waiver

¹⁰ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of February, 2022.

HONORABLE REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Phillip B. Slape, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Hon. Pamela J. Fuller, Administrative Law Judge