

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DONALD KENNEDY)	
Claimant)	
V.)	
)	
PROPHET PAINTING)	AP-00-0463-222
Uninsured Respondent)	CS-00-0459-380
AND)	
)	
KANSAS WORKERS COMPENSATION)	
FUND)	

ORDER

The claimant, through Jeff Cooper, requests review of Administrative Law Judge (ALJ) Bruce Moore’s preliminary hearing Order dated January 13, 2022. The uninsured respondent did not appear. Timothy Emerson appeared for the Kansas Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the preliminary hearing transcript with exhibits, held January 13, 2022, and the documents of record filed with the Division.

ISSUE

Did the respondent have the requisite payroll threshold of \$20,000 to be subject to the Kansas Workers Compensation Act?

FINDINGS OF FACT

The claimant began working as a painter for the respondent on June 2, 2021.

On July 29, 2021, the claimant was spraying a ceiling at a Wilson Lake house when he walked off the side of a balcony and fell approximately 13 feet. The left side of his body landed on concrete, and he injured his left hip, left wrist and hand. The claimant required open reduction and internal fixation of the 5th proximal interphalangeal joint.

Joseph Bustos, who is the respondent's owner, and the claimant agreed how much the claimant was paid based on the size of the house. The claimant was paid in cash. Between June 2, 2021 and July 29, 2021, the claimant was paid a total of \$4,550. He was owed \$1,500 for the work he was doing when the accident occurred, but was never paid. The claimant testified he would have continued working for the respondent if not for his injury, and other houses were lined up for him to paint.

The claimant denied knowing what other employees were paid. He testified the respondent had difficulty keeping employees. The claimant indicated there were usually one or two additional employees at the job sites, in addition to Mr. Bustos, and there were three additional employees working at the Wilson Lake house:

A. . . . Let's see, at the first Valley Center house, it was Josh Kash Then at the second Valley Center house, that would have been me, of course, me obviously, but that was where Ruben Solis was. The third Valley Center house was Joshua Bramwell. And Ricardo, I can't remember his last name, first name was Ricardo.

Q. Okay.

A. The Halstead house was Joshua Bramwell again. The Bel Aire house was Aaron Miller. The Wilson Lake house was - - there was a girl named Barbara. Aaron Miller was there. And Steven, I don't know Steven's last name.

Q. And it is your testimony that the individuals that you've listed, Josh Kash, Ruben Solis, Joshua Bramwell, Ricardo, Aaron Miller, Barbara, and Steven, were all employees of Prophet Painting?

A. Yes, at one time they were.¹

After his accident, the claimant communicated with Mr. Miller and Mr. Bramwell and inquired if they were paid for the Wilson Lake house job and if they were still working for Mr. Bustos. The claimant understood the respondent was still doing business. Upon his release from the hospital, the claimant attempted to contact Mr. Bustos about additional medical treatment and getting paid for his last job, but Mr. Bustos provided excuses and did not want to speak, especially after the claimant obtained legal counsel.

At his attorney's request, the claimant saw Dr. Pedro Murati on September 23, 2021. The claimant complained of pain, tingling and immobility involving the 3rd through 5th digits of his left hand and an inability to grasp with the left hand. The claimant denied any low back or left hip problems. Dr. Murati diagnosed the claimant with status post preexisting

¹ P.H. Trans. at 26-27.

ORIF with plate and screws in the left wrist, posterior dislocation of the 5th proximal interphalangeal joint with reduction, and loss of range of motion of the 3rd, 4th and 5th digits. The doctor provided work restrictions and recommended additional treatment, including an evaluation by a hand specialist.

Since September 23, 2021, the claimant worked small jobs within Dr. Murati's restrictions. He continues to have problems with his left hand and his "pinky" finger, ring finger and middle finger. The claimant is unable to carry heavy objects or make a fist with his left hand and has very stiff, sore and swollen fingers.

At the preliminary hearing and from the bench, the ALJ indicated there was insufficient evidence to show the respondent had the requisite payroll for the Kansas Workers Compensation Act to apply, and he "[u]nfortunately . . . cannot get over this jurisdictional hump."² The ALJ twice suggested the claimant obtain testimony from his coworkers before "reasonable assumptions"³ concerning payroll could be made. The ALJ also ensured the record documented lack of cooperation from Mr. Bustos, in terms of communicating with counsel for the Fund. Similarly, the claimant's attorney indicated Mr. Bustos would not return his phone calls.

The ALJ's Order stated:

Claimant suffered personal injury by accident, arising out of and in the course of his employment with Respondent, when he fell from a deck while painting on July 23, 2021. The fall was, based on evidence currently available to the court, the prevailing factor causing Claimant's injuries and need for treatment. Claimant's pre-injury gross average weekly wage is calculated to be \$729.79.

Claimant has failed, however, to establish that this court has jurisdiction, or that the claim is subject to the Act. Claimant has not sustained his burden of proof that the respondent's 2021 total gross annual payroll was, or was reasonably estimated to be, \$20,000.00 or more.

Claimant's preliminary hearing requests are **CONSIDERED** but **DENIED**.⁴

The claimant argues he proved coverage under the Act because the respondent either had or would reasonably be expected to have payroll in excess of the \$20,000

² *Id.* at 47.

³ *Id.* at 48; see also pp. 49-50.

⁴ ALJ's Order.

threshold, even if the other employees were simply paid minimum wage. The Fund maintains the Order should be affirmed.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. According to K.S.A. 44-501b(c), the burden of proof shall be on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

Coverage under the Workers Compensation Act is excluded pursuant to K.S.A. 44-505(a)(2).

The claimant has the burden to prove coverage under the Act under K.S.A. 44-505(a)(2),⁵ which states:

(a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:

...

(2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection[.]

Here, the preceding calendar year is 2020 and the current calendar year is the year of the accident, 2021.⁶ The ALJ addressed the current calendar year. The ALJ indicated the claimant only proved his earnings over nearly a two-month period, but did not present other evidence to meet the current calendar year threshold of more than \$20,000. The ALJ suggested the claimant obtain additional evidence from coworkers regarding their pay.

⁵ See *Slusher v. Wonderful House Chinese Rest., Inc.*, 42 Kan. App. 2d 831, 833, 217 P.3d 11 (2009).

⁶ *Id.* at 834.

The ALJ's Order is affirmed. Like the ALJ, the undersigned only knows what the claimant was paid. How much the other workers were paid and how long they worked was not established. Whether the respondent worked all year is unknown. The undersigned notes a single employee earning minimum wage on a full-time basis would earn \$15,120.60 in a year (\$7.25 x 40 hours per week x 52.14 weeks). Such a hypothetical figure, combined with the claimant's earnings, would prove more than a \$20,000 payroll for the current calendar year. However, the claimant indicated there was significant employee turnover and the record does not prove any earnings apart from those of the claimant. Simply put, the ALJ correctly ruled speculation is needed to reach the threshold of more than a \$20,000 payroll for the current calendar year, 2021.

WHEREFORE, the Board affirms the ALJ's Order dated January 13, 2022.

IT IS SO ORDERED.

Dated this _____ day of February, 2022.

JOHN F. CARPINELLI
BOARD MEMBER

c: (via OSCAR)

Jeff Cooper
Timothy Emerson
ALJ Bruce Moore

c: (via USPS)

Prophet Painting
3313 E Countryside
Wichita, KS 67218