BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SHELLY COBERLEY	)	
Claimant	)	
V.	)	
	)	AP-00-0481-271
SOUTHERN WINDS EQUINE RESCUE & RECOVERY CENTER	)	CS-00-0458-752
Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Workers Compensation Fund (the Fund) appeals the January 31, 2024, Award entered by Administrative Law Judge (ALJ) Gary K. Jones. The Board heard oral argument on June 13, 2024.

APPEARANCES

Jordan Massey appeared for Claimant. Terry Torline appeared for the Fund. Respondent was not represented and did not appear.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the Evidentiary Deposition of Claimant, from August 18, 2021, with exhibits attached; Evidentiary Deposition of Vincent McMullen, from August 18, 2021; transcript of Preliminary Hearing from August 25, 2021, with exhibits attached; transcript of Preliminary Hearing from June 1, 2022, with exhibits attached; Evidentiary Deposition of Vincent McMullen from March 30, 2023; Regular Hearing transcript from November 7, 2023; Evidentiary Deposition of J. Mark Melhorn, M.D. from November 15, 2023, with exhibits attached; the documents of record filed with the Division and the parties' briefs.

ISSUES

1. Was Claimant's accidental injury covered by the Kansas Workers Compensation Act:

a. Was Respondent engaged in an agricultural pursuit and thus excluded from the Act?

b. Was there an employee/employer relationship between Claimant and Respondent?

c. Did Respondent have sufficient payroll to be covered by the Act?

2. Did Claimant's accidental injury arise out of and in the course of her employment?

3. Did Claimant provide timely/proper notice of her accidental injury to Respondent?

4. What is the nature and extent of Claimant's impairment?

5. Is Claimant entitled to future medical treatment?

6. Should the Board take judicial notice of a default judgement of $5,000,000 entered against Vincent McMullen and other defendants?

7. Did the ALJ have jurisdiction to order the Fund to pay benefits?

FINDINGS OF FACT

Respondent (Southern Winds) is a not-for-profit horse rescue facility. It shelters, feeds, and rehabilitates abused and neglected horses with the hope of placing them with responsible owners.

Claimant worked Fridays, Saturdays and Sundays, reported to work at 7:30 a.m. and worked until her tasks were completed. Claimant's tasks included cleaning stalls, feeding horses and other tasks as needed. Claimant performed a lot of groundwork, which was leading the horses, brushing them, and getting them accustomed to being handled. According to Claimant, her job duties increased when Mr. Victor McMullen, father of Vincent McMullen became ill.

According to Respondent, Claimant was paid $50 per day. Claimant testified she was paid $75 per day for barn care and fence running and $35 per day for groundwork and riding. Claimant received a 1099 tax form for the wages she received from Respondent. Claimant has not filed her 2020 taxes due to a dispute with the IRS over her 2019 tax return. Claimant was paid $7,622.18 in 2020 and approximately $3,000 in 2021. Vincent McMullen, treasurer and operator of the facility, testified in 2021, Claimant was paid $2,600 in contractor wages and a $3,000 bonus when Respondent closed in 2021. Claimant was

paid wages from January to June in 2021, despite Claimant not working from March to June.

On March 9, 2021, Claimant injured her right hand while loading horses into a horse trailer. March 9 was not a usual work day for Claimant. Claimant and Leah Walton, the caretaker, were loading four horses into a horse trailer borrowed from Claimant's landlord. Respondent needed the four horses taken off the property, to be transported elsewhere to be housed. The property had been sold. The horses were to be taken to Claimant's home. Claimant's owned two of the horses and was fostering the other two.

Claimant stepped into the trailer to load one of the horses, the horse stopped, threw its head up and the lead rope Claimant had in her right hand wrapped around her hand, as the horse backed out of the trailer. Claimant's hand was pulled up against the trailer, pulling off three of her fingers.

Claimant was transported to the hospital and was treated by Dr. Melhorn. Three of Claimant's fingers on her right hand were amputated. Claimant was released from Dr. Melhorn's care on May 10, 2021.

Leah Walton was present and witnessed the event when Claimant injured her hand. Ms. Walton told Mr. Vincent McMullen , about Claimant's accident the next day. Claimant told Roxie Linden, a board member of Southern Winds, about her accident shortly after it happened. On June 30, 2021, Claimant's attorney sent a letter to Respondent notifying them Claimant had suffered a work-related injury to her right hand on March 9, 2021, and she was filing a workers compensation claim. According to Mr. Vincent McMullen, he first learned Claimant was claiming workers compensation benefits when he received the letter dated June 30, 2021, on July 3, 2021, from Claimant's attorney.

Claimant testified Ms. Walton also performed services for Respondent in 2019. She rode the horses as part of their rehabilitation.

Mr. Vincent McMullen testified Respondent was created by his parents in 2002, as a rescue ranch where abused horses were raised, fed and cared for until adopted. Operation of the facility required horses be fed, stalls cleaned and buildings maintained. Respondent was a 501(c)(3)corporation and was dissolved in May 2021.

Mr. Vincent McMullen acknowledged Claimant provided services to Respondent by cleaning stalls and feeding horses on the weekends. Claimant was designated as an independent contractor.

According to Mr. Vincent McMullen, Leah Walton was the caretaker who isolated and trained the horses. As the caretaker, Ms. Walton directed the necessary work to be done.

Mr. Vincent McMullen testified Ms. Walton was designated as an independent contractor. Since June 2020, Ms. Walton was paid by check every two weeks in the amount of $1,153.54 and received a 1099 at the end of the year. Ms. Walton was expected to work 40 or more hours per week. The equipment to perform the services was provided by Respondent.

To Mr. Vincent McMullen's knowledge, there have never been any employees and the money paid to the contractors was reported to the IRS on the 1099 form. According to Mr. Vincent McMullen, there were two contractors, Claimant and Ms. Walton, in 2021 and their total pay was less than $20,000.

According to Mr. Vincent McMullen, the Respondent was not required to carry workers compensation insurance because they had no full-time employees. They had general liability coverage for visitors.

Roxanne Linden was a former Board Member for Respondent from around 2018 until 2019, and from the fall of 2020 until Respondent's dissolution in May 2021. Ms. Linden testified Ms. Walton was the caretaker of the horses for Respondent and produced the newsletter. She testified Ms. Walton also took care of getting the new facility established at the new location and running the facility, which included training the horses and getting them adopted. Ms. Walton did not start working full-time until after the founder of Southern Winds, Victor McMullen could no longer handle the work alone and passed away.

According to Claimant and Ms. Linden, the horses were rehabilitated and adopted or fostered out until adoption. They did not perform any kind of ranch work at the facility. The operation was funded by donations.

Mr. Vincent McMullen testified there were six horses on the property in 2021, three belonged to Respondent and three to Claimant. Claimant was housing her horses there until she could finish preparing her property for her horses.

Claimant has not worked since the accident. She reported not being interested in returning to work at this point. Claimant is able to perform her activities of daily living with some accommodation and adaptation. Claimant reported trouble carrying objects and with sleeping due to the pain. Claimant's right hand still aches all the time and her left hand has numbness. Claimant believes the numbness in the left hand is due to overuse. Claimant takes 6 to 8 ibuprofen over-the-counter during the course of a day for pain, which provide little relief. Heat and rest provide some pain relief.

A preliminary hearing was held on August 25, 2021, to determine compensability of the claim. The ALJ issued an order on September 15, 2021, finding:

1. Respondent's business consisted of taking care of, or rescuing, abused or neglected horses. Rescuing abused or neglected horses is not typical of an ordinary farmer or related to an agricultural pursuit. The Claimant's claim was not barred under K.S.A. 44-505(a)(1) as an agricultural pursuit.

2. The Court found Claimant was an employee of the Respondent and not an independent contractor.

3. The Court concluded that the Claimant has not shown by a preponderance of the evidence that Ms. Walton is an employee and not an independent contractor.

4. Without evidence Ms. Walton or others in addition to the Claimant were employees of the Respondent, the record does not show there was sufficient payroll to show coverage under the Act.

4. The Court concluded Claimant's injuries arose out of and in the course of the Claimant's employment.

5. Mr. Vincent McMullen testified he was told about the accident the day after it happened. K.S.A. 44-520(a)(4) does not require Claimant to claim workers compensation benefits within 20 days. The notice is sufficient if it is apparent that the Claimant suffered a work- related injury. The Court found that proper was timely given.

6. The Claimant's request for workers compensation benefits were denied because the Claimant failed to prove the Respondent had sufficient payroll for coverage under the Act.[1]

No party appealed the September 15, 2021, order.

A second preliminary hearing was held on June 1, 2022, where Roxie Linden testified and four exhibits were admitted.

A second preliminary hearing order, issued on June 17, 2022, affirmed all findings and conclusions of the order issued on September 15, 2021, except ALJ Jones found the Respondent had sufficient payroll to be covered under the Act and the Fund was ordered to pay the medical bills presented by Claimant at a hearing held on August 25, 2021.

The June 17, 2022, Order was appealed to the Board, which issued an order, dated October 19, 2022, affirming the ALJ's finding Claimant was entitled to compensation for her injuries.

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[1] ALJ Order (Sept. 15, 2021).

The Fund arranged to have Dr. Mark Melhorn examine Claimant on May 4, 2023. He evaluated Claimant for a prosthesis and opined a prosthesis at the location of Claimant's injury is difficult. He recommended no prosthesis. He opined Claimant's complaints in her left hand were not due to overuse. Dr. Melhorn determined Claimant could work regular duty as tolerated. Based on reasonable and medical probability and the *American Medical Association Guides to the Evaluation of Permanent Impairment 6th Edition,* he opined Claimant has a 35 percent impairment of the right hand.

Dr. Melhorn when asked about any treatment he would recommend for continued pain and discomfort Claimant has, particularly when the weather gets cold. He recommended Claimant keep the hand warm with a glove or a mitten. For intermittent pain usually over-the-counter medications are effective.

The Kansas Attorney General's office filed a fraud suit against Vincent McMullen and other multiple defendants for misappropriation of charitable funds and for not properly dissolving the charitable organization.

Allegedly, Mr. Vincent McMullen received, collected, and deposited at least 110 charitable donations made to Southern Winds Equine Rescue & Recovery Center knowing it was dissolved. He then used the charitable donations to purchase items, property, or services not related to charitable purposes. He also did not disclose to the donors where the donations were going.

According to the Fund, a judgment was entered in District Court against Vincent McMullen and other defendants on April 4, 2024, after the case was submitted to the ALJ and was not part of the record.

This case went to regular hearing and the ALJ found the issues were previously addressed by the Court and the Board and because no new evidence was presented, the ALJ again found the Respondent was covered by the Act; Claimant was an employee and not an independent contractor; Claimant's injury arose out of and in course of her employment with the Respondent; Claimant provided timely notice; Claimant had not shown it is more likely than not she will need future medical benefits. Although Dr. Melhorn's testimony indicated future medical was a possibility, he did not say it was more likely than not. While, the Fund asserted Respondent has the financial ability to pay benefits, the Court found this argument without merit. The lawsuits filed by the Attorney General's office were allegations that had not been proven. The Court found Respondent is unable to pay benefits and all benefits owed to the Claimant under the Award were to be paid by the Fund. The ALJ awarded Claimant a 35 percent impairment to the right hand. Future medical was denied.

PRINCIPLES OF LAW AND ANALYSIS

The Fund puts forth several arguments as to why the ALJ's decision should be reversed. First, the general nature of Respondent's business was to raise horses with the hope one day the horses could be adopted by responsible owners, it is unquestionable that operating a ranch, raising, feeding and caring for horses falls within the traditional meaning of "agricultural" as that term is commonly understood. The fact the horses had previously been abused or that they might someday be adopted does not change the fact the primary purpose at Respondent was taking care of horses – an agriculture pursuit. Second, Claimant was considered an independent contractor by Respondent and paid "non-employee compensation" which was reported to the IRS on a 1099.

Third, Respondent did not meet the $20,000 threshold and would therefore not be subject to the Kansas Workers Compensation Act no matter what time frame is used. Fourth, Claimant was injured on a personal errand to take her adopted horses back to her home. Her injury did not arise out of or in the course of employment. Fifth, Claimant did not notify the respondent she believed she had suffered a workers compensation injury or she intended to claim workers compensation benefits until respondent received claimant attorney's letter seeking benefits on July 3, 2021. Sixth, the Fund argues there is no jurisdiction to order the Fund to pay benefits to Claimant.

The Fund goes on to argue the fact there has not yet been a final adjudication in the Attorney General lawsuit compels a finding it is premature at this time to reach a conclusion whether Respondent is capable of paying benefits or not. Further, because the financial capability issue cannot be decided until final adjudication of the Attorney General lawsuit, the ALJ and the Board currently lack jurisdiction to make such a finding as well as lack the jurisdiction to order the Fund to pay benefits.

The adjudication took place in the process of this appeal and the District Court on April 4, 2024, entered a default judgment against Vincent McMullen and other defendants ordering Mr. Vincent McMullen and the other defendants to pay Respondent back the charitable donations. The Fund now argues Mr. McMullen is financially capable of paying Claimant's award and the Board should take judicial notice of the decision and make this finding. The Fund requests the ALJ's Award be reversed.

Claimant argues the Award should be modified to include entitlement to future medical and affirmed in all other aspects.

K.S.A. 44-501b provides:

> (a) 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.
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> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) 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.

1a. Respondent is not engaged in an agricultural pursuit.

K.S.A 44-505(a)(1) 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 the such act shall not apply to:
>
> (1) Agricultural pursuits and employments incident thereto, other than those employments in which the employer is the state, or any department, agency or authority of the state;

In *Witham v. Parris*[2], the Kansas Court of Appeals adopted from Idaho case law a three part test in determining whether a business or pursuit is an agricultural pursuit. The three part test is (1) the general nature of the employer's business; (2) the traditional meaning of agriculture as the term is commonly understood; and (3) that each business will be judged on it own unique characteristics.

The Fund argues *Witham* is distinguishable from the present case. However, their activity is not much different than boarding horses for fee, Respondent was simply caring for horses. In *Witham,* the business was boarding and training horses for a fee and was not an agricultural pursuit as well as just boarding horses for charity is not an agricultural pursuit.

Respondent was engaged in a charitable enterprise involving horses. Their purpose was not raising horses, but sheltering abused and neglected horses to be adopted. Their focus was a charity and a shelter, not agricultural. It was not an agricultural pursuit within

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[2] *Witham v. Parris*, 11 Kan. App. 2d 303, 306, 720 P.2d 1125 (1986).

the traditional meaning of agriculture.

The Fund argues since their workers performed work duties like cleaning stalls and feeding the horses, which can be considered agricultural duties, Respondent is engaged in an agricultural pursuit. This argument is not persuasive. The job duties performed by Respondent's workers were in the furtherance of a charitable enterprise and not an agricultural pursuit

1b. Claimant was an employee and not an independent contractor.

Determination of whether someone is an employee or independent contractor relies on the primary test of whether the employer controls or has the right to control, manner, methods used by the worker in doing a particular task. Actual control does not matter but it is the right to control.

The Kansas Supreme Court in the case of *McCubbin v. Walker*[3], elaborated on the analysis of the right to control and other indica of independent contractor status. The Court cited the case of *Falls v. Scott*[4] wherein the Court stated: "An independent contractor is defined as one, who in exercising an independent employment contracts to do certain work according to his own methods, without being subject to the control of his employer, except as to the results or product of his work."

The Supreme Court stated each case must be determined on its own facts. However, there are many well recognized and fairly typical indicia of the status of independent contractor, although the presence of one or more of such indica in a case is not necessarily conclusive.

> "Such indicia are important as guides to the broader and primary question of whether the worker is in fact independent, or subject to the control of the employer, in performing the work. . . . it has generally been held that the test of what constitutes independent service lies in the control exercised, the decisive question being who has the right to direct what shall be done, and when and how it shall be done. . . . It also been held that commonly recognized tests of the independent contractor relationship, although not necessarily concurrent or each in itself controlling, are the existence of a contract for the performance by a person of a certain piece of kind of work at a fixed price, the independent nature of his business or his distinct calling, his employment of assistants with the right to supervise their activities, his obligation to furnish tools, supplies, and materials, his right to control the progress of the work except as to the final results, the time for which the

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[3] *McCubbin v. Walker,* 256 Kan. 276, 886 P.2d 790 (1994).

[4] *Falls v. Scott*, 249 Kan. 54, 64, 815 P.2d 1104 (1991).

> workman is employed, the method of payment, whether by time or by job, and whether the work is part of the regular business of the employer."[5]

Applying this analysis to Claimant's employment relationship with Respondent, it is found and concluded Claimant was an employee. Claimant was required to report to work at a certain time and on specific days and was to work until the work was done. Claimant was to sign in and out each day she worked. Claimant's job duties were cleaning stalls, feeding horses and maintaining Respondent's property. All of these duties were an integral part of Respondent's business. Respondent furnished all the tools to do the work. Calling an individual an independent contractor and furnishing them with a 1099 form does not an independent contractor make. Respondent controlled Claimant's work as to when and what was to be done.

Analysis of Ms. Walton's employment relationship with Respondent is part of this case. If Ms. Walton is an employee her earnings are counted in the amount of Respondent's annual payroll. Applying the same analysis as above, Ms. Walton is an employee. She was the caretaker and assigned duties, such as isolating and training the horses. Ms. Walton had been working in the caretaker position since June 2020. She was expected to work 40 hours a week or more. Ms. Walton also did a newsletter at the request of Respondent. She oversaw on behalf of Respondent the setting up of the new facility. Respondent, specifically Mr. Vincent McMullen, controlled Ms. Walton's work by designating and prioritizing her job duties and setting her work hours. Ms. Walton was an employee and not an independent contractor.

1c. Respondent had a payroll over $20,000 for the years 2020 and 2021 and is covered by the Act.

K.S.A.44-505(a)(2) states:

> (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;

Both Claimant and Ms. Walton were employees of Respondent. Claimant was paid

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[5] *McCubbin v. Walker,* 256 Kan. 276, 281, 886 P.2d 790 (1994), citing *41 Am. Jur.2d Independent Contractors § 5.*

$7,622.18 for the year 2020. Ms. Walton began working in June 2020 (assuming June 1) as the caretaker and was paid $1,153.54 every 2 weeks. For 2020, Ms. Walton was paid $16,146.76. Respondent's payroll for 2020 was $23,768.94.

For the year 2021, Claimant was paid $2,600 in wages and $3,000 bonus. It is reasonable to estimate the payroll would be the same. It is not reasonable to assume Respondent's business would close down, so Ms. Walton's wages for 2021 was $29,992.04. Respondent's payroll was greater than $20,000.

Respondent was not engaged in an agricultural pursuit, an employee/employer relationship existed between Claimant and Respondent and Respondent had a payroll over $20,000 for the years 2020 and 2021. Thus, Claimant's employment is covered by the Act.

2. Claimant's accidental injury arose out of and in the course of Claimant's employment.

K.S.A. 44-508(f)(2)(B) states: "An injury by accident shall be deemed to arise out of employment only if: (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment."

In *Gould*[6]*,* the Kansas Court of Appeals held:

> The standard for "arising out of" only requires a causal connection between the conditions of the work and the injury–it does not require that the injury occur at the exact moment an employee is performing a certain job task. The standard for "in the course of"requires an employee to be at work and performing job-related acts.[7]

Claimant was injured when she was engaged in activities to further the employer's interests. Respondent needed horses moved off the property where the horses were stabled because the Respondent sold the property. The Fund argues the injury occurred on Claimant's day off and thus she was not on the job. However, Claimant would not be on Respondent's property but for Respondent needing her assistance in moving horses due to a reason created by Respondent. Caring for horses is part of Claimant's job duties. There is no dispute the event occurred causing Claimant's injury and her need for treatment and resulting disability and impairment. It is found and concluded Claimant's accidental injury arose out of and in the course of Claimant's employment.

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[6] *Gould v. Wright Tree Service, Inc.*, No. 114,482, 2016 WL 2811983 (Kansas Court of Appeals unpublished opinion filed May 13, 2016), *rev. denied* 306 Kan. 1317 (2017).

[7] *Id.* at *5.

3. Claimant provided proper/ timely notice to Respondent of her accidental injury.

K.S.A. 44-520 states in part:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 20 calendar days form the date of accident or the date of the injury of repetitive trauma;
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> . . .
>
> (4) The notice, whether given orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by section(a) shall be waived if the employee proves that: (1) The employer or employer's agent had actual knowledge of the injury: (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

On March 9, 2021, Claimant was assisting Ms. Walton load horses for transport from Respondent's property because Respondent had sold the property. Ms. Walton was essentially Claimant's supervisor. In the presence of Ms. Walton, and when Claimant was loading a horse Claimant suffered an injury to her right hand requiring amputation of three fingers to her right hand. Claimant required immediate, emergency hospital treatment. Claimant did not formally seek workers compensation benefits until filing a claim on June 30, 2021. However, Claimant had an injury which required emergency medical treatment on Respondent's premises, assisting another of Respondent's employees in work because Respondent had sold the property. It was clear from the circumstances Claimant had suffered a work-related injury. Mr. Vincent McMullen knew of the circumstances of the accident and injury on March 10, 2021, from Ms. Walton. Ms. Walton had actual knowledge the day of the accident because she was present when the accident occurred. It is found and concluded Respondent had actual notice of the accidental injury on March 10, 2021, at the latest.

Respondent knew the circumstance of Claimant's injury, which occurred when Claimant was performing duties in the furtherance of Respondent's interests. It is reasonable to conclude a potential work related accident occurred, which triggers the claiming of workers compensation benefits. It is found and concluded Respondent received timely and proper notice of Claimant's work-related accidental injury.

4. The nature and extent of Claimant's impairment is 35 percent to the right hand.

Dr. Melhorn is the only physician who provided an impairment rating. He opined based on the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition* and reasonable medical probability Claimant has a 35 percent permanent impairment to the right hand.

5. Claimant is not entitled to future medical treatment.

K.S.A. 44-510h(e) states:

> It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

Dr. Melhorn did not recommend any future medical treatment except over-the-counter medications. Over-the-counter medication is not a basis for awarding future medical treatment. Request for future medical treatment is denied.

6. The Board shall not take judicial notice of the default judgment against Mr. Vincent McMullen and other defendants for $5,000,000.

K.S.A. 44-555c(a) provides in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the appeals board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

This review is commonly referred as de novo review on the record.

The District Court judgment was not part of record before the ALJ because the judgment was entered after the case was submitted to the ALJ. By taking judicial notice of documents not presented in the proceedings before the administrative law judge, the Board would be exceeding the statutory authority given to them. The Board would be adding to a record not presented the administrative law judge. This judgment does not establish Respondent's ability to pay. The lawsuit is against Mr. Vincent McMullen and other multiple defendants.

The Fund argues K.S.A. 60-412(c) allows "a reviewing Court in it discretion to take judicial notice of any matter specified in K.S.A. 60-409 whether or not judicially noticed by the judge." This statute is not applicable to this Board. This statute concerns courts operating under Chapter 60 of the Kansas statutes. The Board is a creature of Chapter 44 of the statutes and are bound by the authority given them under such statutes. For these reasons Respondent's motion to take judicial notice of the default judgment is denied.

7. The ALJ has authority to order the Fund to pay Claimant's benefits.

K.S.A. 44-532a states:

> (a) If an employer has no insurance or has an insufficient self-insurance bond or letter of credit to secure the payment of compensation as provided in subsection (b)(1) and (2) of K.S.A. 44-532, and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569, and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.

The evidence presented as to Respondent's ability to pay Claimant's benefits includes Respondent not having workers compensation insurance. The case of *Helms v. Pendergast*[8] puts the burden on the Fund to prove an uninsured employer's ability to pay. No evidence was presented by the Fund as to Respondent's assets and actual ability to

[8] See *Helms v. Pendergast*, 21 Kan. App.2d. 303, 899 P.2d 501 (1995).

pay. There was a lot of speculation and allegations but no actual facts. Respondent is dissolved and uninsured. There were sales of property allegedly owned by Respondent. However no evidence presented this property was encumbered by other obligations. A lawsuit was filed against Mr. Vincent McMullen and five other defendants by the Attorney General alleging these defendants misappropriated Respondent's funds. There is no such guarantee any of the of these alleged misappropriated funds will be returned to Respondent.

If Respondent's circumstances change and it is established they have the ability to pay there is a remedy to recover money paid out on this claim.[9]

The Fund cites a case *Miner v. CX Transportation*[10] where the Court of Appeals held until the employer's bankruptcy proceedings were concluded determining the amount, then the liability of the Fund in the workers compensation case cannot be determined. The Board does not find this case applicable. It involves a bankruptcy proceeding. The Attorney General lawsuit is different. It is seeking the return of money not a determination of Respondent's assets.

The Fund also argues Mr. Vincent McMullen has assets and ability to pay this claim. Respondent is a corporation with a board. There is no evidence Mr. Vincent McMullen's assets are the Respondent's assets.

This claim is covered by the act. It is a compensable claim and the Fund is ordered to pay Claimant's benefits.

DECISION

WHEREFORE, it is the finding, decision an of the Board that the Award of Administrative Law Judge Gary K. Jones dated, January 31, 2024, is affirmed.

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[9] See K.S.A. 44-532a(b)

[10] *Miner v. CX Transportation,* 33 Kan. App.2d 106, 97 P.3d 1069 (2004).

IT IS SO ORDERED.

Dated this _____ day of August, 2024.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Via OSCAR

Jordan Massey, Attorney for Claimant
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Hon. Gary K. Jones, Administrative Law Judge

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