BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SELVIN GEOVANNY CABRERA LOPEZ	)	
a.k.a MATHEW ROSA	)	
Claimant	)	
V.	)	
	)	AP-00-0481-482
ELITE STEEL INC.	)	CS-00-0478-825
Respondent	)	
AND	)	
	)	
FARM BUREAU PROPERTY & CASUALTY INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant appeals the February 9, 2024, preliminary hearing Order entered by Administrative Law Judge (ALJ) Larry Gurney.

APPEARANCES

Jordan Massey appeared for Claimant. Matthew Crowley 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 Evidentiary Deposition of Omar Reyes taken January 25, 2024; the transcript of Preliminary Hearing from January 31, 2024, with exhibits attached; the documents of record filed with the Division; and the parties briefs.

ISSUE

Did Claimant's alleged injury arise out of and in the course of his employment?

FINDINGS OF FACT

Claimant has worked for Respondent for two years as a laborer. His job is to put together materials at the job site. Claimant lives in Dodge City, Kansas. Most of the jobs Claimant has worked for Respondent are outside of Dodge City. The foreman picks the

workers up at their homes and transports them to the job sites. Claimant earned $15.50 an hour, worked 9 to 11 hours a day, five days per week.

The job Claimant worked during the week prior to January 14, 2023, was in Oakley, Kansas.

On January 13, 2023, Omar Reyes, a foremen for Respondent, contacted Claimant and asked if he wanted to work on Saturday erecting a shed, located about 10 minutes outside of Dodge City. Claimant agreed.

On January 14, 2023, Claimant was picked up at his home by a co-worker named Luis and taken to the job. The job was arranged by Omar Reyes to erect a shed for a friend of Mr. Reyes. Claimant and two of his co-workers were erecting the shed.

Claimant was up in the rafters of the shed attempting to install a purlin on one of the building rafters. The rafter Claimant was working on shifted and Claimant fell 25 to 30 feet onto a concrete floor.

Claimant suffered injury to his mouth, where three of his teeth were knocked out, both knees, both hands and his head. Claimant was taken to the hospital in Dodge City and then Wesley Hospital in Wichita. Claimant had surgery on his head and right arm. He spent 10 days in the hospital and was released January 23, 2023.

According to Claimant, Mr. Reyes told him at the hospital he would take care of Claimant's appointments and not to worry. Claimant believed Respondent would pay for everything.

When Mr. Reyes contacted Claimant about the Saturday job, there was not much discussion about who the job was for or what the arrangements were. Claimant did not think doing the Saturday job was optional. Company tools and the company vehicle were used. Claimant does not normally work for Respondent on Saturday, but it is occasionally required by Respondent. Claimant was not told this Saturday job was an optional job, but was asked to go and help.

Omar Reyes has been employed by Elite Steel for 12 years and manages the jobs and the employees. He does not have the authority to hire or fire anyone. He reports any type of employee problems to the owner Jarred Dowell. Mr. Reyes cannot enter into any contracts on behalf of Elite Steel nor is he authorized to purchase any equipment.

Mr. Reyes had a friend who needed help erecting a shed. He asked Claimant and two other workers if they would help and they agreed. They were all to be paid in cash. According to Mr. Reyes, this was a side job for extra money. Elite Steel was not involved

and did not receive any compensation for this side job or the use of their equipment. According to Mr. Reyes, these side jobs were optional and could be declined. He did not tell Claimant or any of the others that they had to take the side job. He did not provide the details of the job or payment for the job because he did not expect anything to happen.

It was not until Claimant was injured did the topic of the job not being related to Elite Steel come up. Mr. Reyes was called about the accident by his friend.

Respondent, Elite Steel, erects pre-engineered metal buildings and takes job all over the Midwest. They hire general laborers. Currently, the company has 10 general laborers, with at least two employees who are foremen. They operate Monday through Friday and occasionally on a weekend.

Jarred Dowell, the owner, testified the length of the job depends on the size of the building and weather conditions. Most jobs take about two weeks, but every once and a while, months. The foremen are provided company trucks to drive to and from the job sites and the tools for the jobs are provided by Respondent. Elite Steel's main foreman is Omar Reyes.

Mr. Dowell is the only individual in the company who has the authority to hire and fire employees, establish company policies, enter into contracts for the company and purchase company equipment.

Mr. Dowell learned of Claimant's accident and injury from Omar Reyes who called him on his way to the hospital. Mr. Dowell testified the job where Claimant was injured was not an Elite Steel job.

Mr. Dowell was aware employees occasionally used Elite Steel's equipment for side jobs to earn extra money and there were no repercussions for doing so. These side jobs were not frequent because frequently the Elite job sites are outside of Dodge City. This left only weekends for free time to do side jobs. Mr. Dowell was aware of the foremen using the trucks and tools for jobs outside of Elite Steel.

Elite Steel did not receive any kind of compensation, including, for the use of their equipment from the job where Claimant was injured.

Mr. Dowell continued to pay Claimant after the accident and while he was unable to work. Clamant was able to return to work for Elite Steel with restrictions and is being accommodated. The company has workers compensation coverage. No medical compensation was paid by Elite Steel.

According to Mr. Dowell, Claimant was not working on an Elite Steel job when he

was injured. There was no contract to do work between Elite Steel and Mr. Reyes' friend.

The ALJ found Claimant failed to establish the employer/employee relationship with Respondent existed at the time of Claimant's accident and denied Claimant's preliminary hearing requests.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues because weekend work was sometimes required and side jobs in the vicinity using Respondent's tools was a known practice, Claimant was in the course of his employment with Respondent when the injury occurred. Claimant requests the Order be reversed and Respondent ordered to provide the names of two physicians so Claimant can select a treater and reimbursement for Dr. Murati's examination and report.

Respondent argues the ALJ's Order should be affirmed. There was no connection between Respondent and the side job Claimant was on when the accident and injury occurred.

K.S.A. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

The issue is when Claimant was injured was he in the course of his employment. The ALJ denied the claim on the basis of no employer/employee relationship exists when Claimant was injured. This Board member agrees with the ALJ's decision. This claim is not compensable because Claimant's injury did not arise out of and in the course of employment. Respondent does not deny Claimant was an employee but denies Claimant was performing work arising out of in the course of Claimant's employment, when he was injured.

An employer is liable to pay compensation for an employee's personal injury by accident arising out of and in the course of employment.[1]

> " 'The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44-501 et seq., have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase *"out of"* employment points to the cause or origin of the

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

> worker's accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase *"in the course of"* employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service. [Citations omitted.]' "
>
> We have long stated an injury happens in the course of employment " 'when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.' " [Citations omitted.][2]

It was Claimant's belief he was working on a job for his employer when he was injured because he was working with Respondent's foreman and employees using employer's tools and equipment.

However, a belief is not sufficient to establish Claimant was performing work arising out of and in the course of employment. It is acknowledged the circumstances of how the job was scheduled and set up was not fully explained to Claimant. There are facts, which arguably, establish Claimant was in the course of his employment when he was injured, such as Claimant being asked by the foreman to work and using Respondent's equipment. Despite the lack of explanation to Claimant, the job was arranged by the foreman with a friend of his and not by the owner. The foreman had no authority to act on behalf of Respondent to contract jobs. Saturday, the day Claimant was injured was not a scheduled work day with Respondent. Respondent's tools and employees were being used. However, Respondent allows employees to use Respondent's tools for side jobs to earn extra money. Respondent received no compensation for the use of their tools and for the work done on this job. Claimant simply was not at work in the employer's services, despite what he believed, when he was injured. It is found and concluded Claimant's injury did not arise out of and in the course of employment.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Larry Gurney, dated February 9, 2024, is affirmed.

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[2] *Atkins v. Webcon*, 308 Kan. 92,98, 419 P.3d1 (2018).

IT IS SO ORDERED.

Dated this _____ day of May, 2024.

_____
REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Jordan Massey, Attorney for Claimant
Matthew Crowley, Attorney for Respondent and its Insurance Carrier
Hon. Larry Gurney, Administrative Law Judge