BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

EVAN TAKACH	)	
Claimant	)	
V.	)	
	)	AP-00-0481-734
S-C-H TRANSPORT, LLC	)	CS-00-0478-700
Uninsured Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant requested review of the March 5, 2024, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Scott J. Mann appeared for Claimant. Brock J. Baxter appeared for Respondent. John C. Nodgaard and Kathryn Gonzales 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 transcript of the Preliminary Hearing held December 5, 2023, with exhibits attached; the transcript of the Discovery Deposition via Videoconference of Evan Joseph Takach from October 10, 2023; the transcript of the Evidentiary Deposition of Scott Harrington from November 8, 2023, with exhibits attached; and the documents of record filed with the Division.

ISSUES

1. Was Claimant an employee or an independent contractor of Respondent?

2. Has Respondent met the payroll threshold to be a covered entity under the Kansas Workers Compensation Act (Act)?

3. Was Respondent engaged in an agricultural pursuit?

4. If found to be a compensable claim, is the Fund responsible for Claimant's benefits under the Act?

FINDINGS OF FACT

Claimant, a resident of Florida, has been a commercial truck driver for 15 years. On May 19, 2023, near Beaver, Oklahoma, Claimant was hauling hay bales with a tractor/trailer when he was pulled over by law enforcement. Claimant was informed his load of hay bales was leaning. Claimant pulled into a nearby rest stop to inspect the load. While performing the inspection, a hay bale, weighing approximately 1,600 to 1,800 pounds, fell onto Claimant and knocked him to the ground. Claimant was taken via ambulance to Liberal, Kansas, and subsequently life-flighted to Wesley Medical Center in Wichita, Kansas. Claimant has not worked since May 19, 2023.

Respondent, S-C-H Transport, LLC, incorporated by Scott Harrington in 2019, is an over-the-road trucking company based in Haysville, Kansas. Respondent owned two semi-tractors and two semi-trailers. Mr. Harrington drove one tractor/trailer, and Adam Vrana, Respondent's employee, drove the other. Mr. Vrana drove for Respondent from April to December 2022. Mr. Vrana earned 25 percent of the gross earnings of the loads he delivered, Respondent arranged those loads, and Respondent was responsible for the truck's maintenance. Respondent purchased workers compensation insurance, effective March 2022, prior to Mr. Vrana's employment. When Respondent's insurance dropped Mr. Vrana in December 2022, Mr. Vrana was terminated.

Mr. Harrington stated Respondent cancelled its workers compensation insurance after Mr. Vrana's termination. Mr. Harrington explained the trucking industry was in decline, and Respondent was winding down its business. Mr. Harrington did not intend to hire any employees following Mr. Vrana's termination. Respondent put its two trucks up for sale in early 2023. BMO was the lienholder for both tractors, with Kansas State Bank the lienholder for both trailers.

Respondent could not find a buyer to purchase the trucks. Mr. Harrington connected with Claimant through a mutual contact and indicated he was looking for a buyer. Mr. Harrington was familiar with Claimant as they had run loads together in the past. Claimant agreed he was interested in purchasing one of the tractors, a 2019 International. Claimant testified, "I've known [Mr. Harrington] for a few years now, and the option or the opportunity become [*sic*] available for me to be my own boss, so I took it."[1]

[1] Claimant Depo. at 18.

Mr. Harrington testified he initially wanted Claimant to purchase the tractor and lease with another trucking company, to avoid Respondent purchasing tags and insurance. BMO would not approve a lease agreement to another trucking company, however, so Claimant leased with Respondent. Respondent paid for Claimant to fly from Florida to Kansas to meet with Mr. Harrington. On April 8, 2023, Claimant and Respondent entered into a lease-to-own agreement. Respondent agreed to sell the tractor for the amount outstanding, allowing Claimant to take over the lease payments. Claimant did not sign loan documents or make direct payments on the existing loan. Instead, Claimant made these payments by completing load deliveries. Claimant retained 90 percent of the gross earnings for each load. Respondent received 7 percent of the gross earnings, and 3 percent went to the factoring company facilitating the loan payments.

Claimant was responsible for all expenses related to the tractor, including insurance, fuel, tags, and maintenance. Because Claimant did not initially have the funds for these expenses, Respondent agreed to pay the expenses and reimburse itself from Claimant's earnings. All monies from each load went through Respondent because Claimant operated the tractor under Respondent's Motor Carrier number. Mr. Harrington explained:

> Q. (By Mr. Nodgaard) So the only way that he could actually purchase the tractor was if he leased on with your Motor Carrier number?
>
> A. Yes. Unless he'd then bought it outright. Which he didn't have the money, the means of doing that.[2]

Costs of operational expenses, any pay advances, and the monthly payment for the tractor were deducted from Claimant's portion of each load settlement. During the four weeks Claimant drove under the lease-to-purchase agreement, Claimant earned, on average, $1,275.61 per week.

Claimant delivered several loads during the four weeks he drove under the agreement. Claimant negotiated his own loads, using both his personal industry contacts and Respondent's load board subscription. Claimant was in the process of acquiring his own load board subscription at the time of the incident, but he had access to the free version. Claimant testified he never delivered freight for any of Respondent's clients. Claimant was also contractually prohibited from poaching Respondent's clients. Mr. Harrington testified Respondent did not control Claimant's transport or route. Respondent did not supply Claimant's tools, other than the use of a trailer. Respondent did not provide instruction or training to Claimant, nor did it control how Claimant drove or operated the truck.

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[2] Harrington Depo. at 79.

Claimant provided maintenance on the tractor at his own expense. On one occasion, Claimant needed a new radiator when the truck broke down in Colorado. Claimant did not have sufficient funds to purchase a new radiator at that time. Respondent advanced the monies to Claimant with the understanding the amount would be deducted from Claimant's earnings.

Prior to the accident, Mr. Harrington drove Respondent's other truck, delivering loads of hay bales from farmers in Iowa and Nebraska to farmers in Kansas and Oklahoma. Mr. Harrington used a step-deck trailer, which is a flat-bed trailer commonly used in transporting hay bales. Mr. Harrington planned to go on vacation in May 2023. Mr. Harrington asked Claimant if he would like to use the step-deck trailer and haul hay in his absence. Claimant explained, "It was offered to me to pull the step deck to make money instead of sitting around for a week, so I went and did it."[3] Claimant contacted the involved parties and negotiated the arrangements.

Following the accident of May 19, 2023, Claimant could no longer work. The tractor was returned to Mr. Harrington. Mr. Harrington noted Claimant attempted to find drivers for the tractor but was unsuccessful. BMO eventually repossessed the tractors, and Respondent ceased operations on October 1, 2023. Mr. Harrington testified he did not anticipate Respondent having a payroll in excess of $20,000 in 2023.

The ALJ found Claimant was not Respondent's employee at the time of the accident. The ALJ wrote:

> This agreement is key to understanding the relationship. It clearly benefits both parties, with the claimant being financed by the respondent for a truck purchase he could not otherwise afford, and the respondent being relieved of the debt from a truck he was upside down on. Claimant was allowed to accept or reject work as he wished. Claimant was earning 90% of the cash generated by the work, with expenses and truck payments deducted. On balance the court finds preliminarily that the claimant is not under the control of the respondent and is not an employee within the meaning of the act.[4]

The ALJ concluded Respondent is not subject to the Act due to insufficient payroll, finding Claimant earned no wage. Further, the ALJ determined Respondent is not an agricultural pursuit within the meaning of the Act.

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[3] Claimant Depo. at 22.

[4] ALJ Order (Mar. 5, 2024) at 2.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues he was an employee of Respondent's transport business and not operating a distinct business at the time of the incident. Claimant contends Respondent's anticipated annual payroll would exceed $20,000 when including his weekly payments, pursuant to K.S.A. 44-505. Finally, Claimant argues neither he nor Respondent was engaged in any agricultural pursuit when the accident occurred.

Respondent contends the ALJ's Order should be affirmed. Respondent argues Claimant failed to sustain his burden of proving he was an employee at the time of the incident, and further failed to prove Respondent is a covered entity under the Act. Alternatively, Respondent maintains the Fund should be responsible for Claimant's benefits should his claim be found compensable.

The Fund supports Respondent's arguments, stating the ALJ's Order should be affirmed.

1. Was Claimant an employee or an independent contractor of Respondent?

K.S.A. 44-503(a), states:

> Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

It is often difficult to determine in a given claim whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.[5]

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[5] See *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

There is no absolute rule for determining whether an individual is an independent contractor or an employee.[6] The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[7]

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[8]

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

(1) The existence of a contract to perform a piece of work at a fixed price.
(2) The independent nature of the worker's business or distinct calling.
(3) The employment of assistants and the right to supervise their activities.
(4) The worker's obligation to furnish tools, supplies and materials.
(5) The worker's right to control the progress of the work.
(6) The length of time the employee is employed.
(7) Whether the worker is paid by time or by job.
(8) Whether the work is part of the regular business of the employer.[9]

In *Hill*, the Court of Appeals primarily applied the "right to control" test, but expanded the list of additional factors to consider, including:

(1) [t]he existence of the right of the employer to require compliance with instructions;
(2) the extent of any training provided by the employer;
(3) the degree of integration of the worker's services into the business of the employer;
(4) the requirement that the services be provided personally by the worker;

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[6] See *Wallis v. Sec'y of Kansas Dep't of Human Resources*., 236 Kan. 97, 102, 689 P.2d 787 (1984).

[7] See *Knoble v. National Carriers, Inc*., 212 Kan. 331, 510 P.2d 1274 (1973).

[8] *Wallis*, *supra*, at 102-03; *citing Jones*, *supra*, at 780.

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

(5) the existence of hiring, supervision, and paying of assistants by the workers;
(6) the existence of a continuing relationship between the worker and the employer;
(7) the degree of establishment of set work hours;
(8) the requirement of full-time work;
(9) the degree of performance of work on the employer's premises;
(10) the degree to which the employer sets the order and sequence of work;
(11) the necessity of oral or written reports;
(12) whether payment is by the hour, day or job;
(13) the extent to which the employer pays business or travel expenses of the worker;
(14) the degree to which the employer furnishes tools, equipment, and material;
(15) the incurrence of significant investment by the worker;
(16) the ability of the worker to incur a profit or loss;
(17) whether the worker can work for more than one firm at a time;
(18) whether the services of the worker are made available to the general public;
(19) whether the employer has the right to discharge the worker; and
(20) whether the employer has the right to terminate the worker.[10]

In his preliminary Order, the ALJ wrote:

> In this case, respondent provided no instruction to the claimant, and had no control over the route that claimant took to complete his loads. Respondent did assist the claimant by pre-paying expenses that were later deducted from income generated by the claimant. This arrangement was entirely controlled [by] the lease/purchase agreement entered into by the parties. Claimant testified that he had an opportunity to be "his own boss" and he took it. This agreement is key to understanding the relationship. It clearly benefits both parties, with the claimant being financed by the respondent for a truck purchase he could not otherwise afford, and the respondent being relieved of the debt from a truck he was upside down on. Claimant was allowed to accept or reject work as he wished. Claimant was earning 90% of the cash generated by the work, with expenses and truck payments deducted. On balance the court finds preliminarily that the claimant is not under the control of the respondent and is not an employee within the meaning of the act.[11]

The undersigned agrees with the ALJ's assessment. Respondent did not control how Claimant performed the work. The employer's role was as a leasing/selling agent. Claimant was buying the truck and controlled the work he did. Claimant paid for maintenance done on the truck. On the occasion Respondent paid for a repair, Claimant was required to pay Respondent back. The records supports a finding Claimant was

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[10] *Hill v. Kansas Dep't of Labor, Div. of Workers Comp.*, 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 (2009) *aff'd in part, rev'd in part*, 292 Kan. 17, 248 P.3d 1287 (2011).

[11] ALJ Order (Mar. 5, 2024) at 2.

working for himself as an independent business owner, not as an employee for Respondent.

The undersigned finds Claimant is an independent contractor, not an employee, and not covered by the Kansas Workers Compensation Act.

All other issues are moot.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member the Order of ALJ Thomas Klein dated March 5, 2024, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2024.

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SETH G. VALERIUS
BOARD MEMBER

c: Via OSCAR

Scott J. Mann, Attorney for Claimant
Brock J. Baxter, Attorney for Respondent
John C. Nodgaard, Attorney for Kansas Workers Compensation Fund
Kathryn Gonzales, Attorney for Kansas Workers Compensation Fund
Hon. Thomas Klein, Administrative Law Judge