APPEAL NO. 92528

A contested case hearing was held on June 29, 1992, and was recessed and reconvened on August 5 and August 25, 1992. The hearing was held in (city), Texas, before (hearing officer), hearing officer. The sole issue was whether (employer) was the claimant's employer for purposes of workers' compensation insurance pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. article 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act) and a Form TWCC-83 agreement. The hearing officer held that the claimant was the employee of (employer) on (date of injury), the date of his compensable injury, and that that company's workers' compensation insurance carrier was ordered to pay benefits under the 1989 Act.

A request for appeal of this decision was filed by appellant carrier (carrier). The respondent will be referred to herein as "claimant", and (construction company)., will be referred to as "construction company."

The carrier contends as follows: that the claimant did not meet his burden of proof to show that construction company was his employer; that the agreement between construction company and its subcontractor to provide workers' compensation insurance to the latter's employees is "highly suspect and invalid;" that the hearing officer erred in refusing to keep the record open to obtain the claimant's cancelled paychecks; and that the hearing officer erred in her apparent disregard of evidence concerning the validity, or lack thereof, of the agreement to provide workers' compensation insurance.

The carrier's request for appeal, dated October 5, 1992, was timely received by the Texas Workers' Compensation Commission (Commission) on October 7th. The 1989 Act provides that a respondent party shall file a written response to an appeal not later than the 15th day after the date on which the request for appeal is served and shall on the same date serve a copy of the response on the appellant. Article 8308-6.41(a). Rules of the Commission, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5 provide that for purposes of determining the date of receipt for written communications which require action by a date specific after receipt, the Commission shall deem the received date to be five days after the date mailed. Rule 102.5(h). In the absence of any representation to the contrary, we will deem that claimant received the carrier's request for appeal, which was certified as mailed to claimant on October 5th, on October 10th. Therefore, the last date for timely filing of a response would have been October 26th (the 15th day being a Sunday, see Rule 102.3). The claimant's response was dated October 26th but was mailed on "September 28" (sic--we will assume this date was actually October 28th) and received by the Commission on October 29th. Therefore, the timely filing presumption of Rule 143.4(c) cannot be invoked because claimant's response, while received by the Commission no later than 20 days after the date of receipt, was not mailed on or before the 15th day after receipt. We find the response was not filed timely, and it will not be considered by this panel. *See* Texas Workers' Compensation Appeal No. 92079, decided April 14, 1992.

DECISION

We affirm the decision and order of the hearing officer.

The parties stipulated that claimant was injured in the course and scope of his employment on (date of injury), while constructing a structure not exceeding twenty thousand square feet. It was also stipulated that construction company subscribed to workers' compensation insurance with carrier on that date.

Upon review of the record, we adopt the statement of evidence as set forth by the hearing officer in her decision and order. We will summarize the facts of the case briefly.

Claimant worked as a laborer for (AT) ("subcontractor") who, on (date of injury), had subcontracted a job framing a house for construction company. (Mr. BC), owner of construction company, testified that he had himself subcontracted this job from his brother, (Mr. RC), owner of ("framing company"). Mr. BC said that only subcontractor and his employees were on this job site, that once he subcontracts the job he has nothing more to do with it, and that subcontractor was the one who paid the claimant.

On January 13, 1992, Mr. BC on behalf of construction company and subcontractor entered into a form contract entitled "Agreement to Establish Employer-Employee Relationship for Certain Building and Construction Workers," hereinafter referred to as TWCC-83.[1] The agreement, which was for the period January 13-24, 1992, provided for construction company to withhold the cost of workers' compensation insurance from subcontractor, and states that for the purpose of providing workers' compensation insurance coverage construction company will be the employer of subcontractor and his employees. Neither Mr. BC nor subcontractor could give a reason for the effective dates of the agreement, but they stated that the framing work on this particular job took two or three days to complete. The TWCC-83 was notarized on January 13th by (Mr. M), who testified he is an insurance agent who has sold various types of coverage to Mr. BC and Mr. RC.

(Mr. H), an adjuster for carrier, went with another adjuster to claimant's home to interview him on January 27th. Mr. H said that he came along because he is fluent in Spanish and could communicate with claimant. Mr. H testified that in the interview, which claimant refused to allow to be recorded, claimant identified that there were two employers--construction company and framing company--but said Mr. RC directed his employment and that framing company's name was on his paychecks. Mr. H said claimant did not mention subcontractor. The next day, Mr. H said, he received a call from a doctor's office for

[1]Form TWCC-83 actually contains two separate contracts, with instructions to check the agreement which is applicable. The "Joint Agreement to Affirm Independent Relationship For Certain Building and Construction Workers," which provides that the subcontractor and its employees are not the employees of the hiring contractor and as such shall not be entitled to workers' compensation coverage, was not checked and is not an issue in this case.

approval of an appointment for claimant. He talked to claimant, who he said told him Mr. RC had talked to him and told him he was an employee of construction company.

Claimant testified, through a translator, that subcontractor was in charge of the job on which he was injured, and that he did not work with Mr. RC or Mr. BC or any of their employees on that job. He said he first met Mr. RC recently, like in February. He denied that he told Mr. H that he worked for Mr. RC and that he had paycheck stubs to prove it, saying that he did not have any check stubs. He said subcontractor paid him, but he didn't notice what company's name was on the checks.

Mr. RC testified that he has workers' compensation insurance, even though he has no employees, because builders require it. He said he had no relationship with claimant, had never paid him in any way, and that he only knew claimant because he was working, and had gotten hurt, on the job site Mr. RC had contracted.

Subcontractor testified through a translator that he supervised claimant on the job; furnished his employees certain equipment such as saws, extensions, hoses, and air guns (the employees furnished their own hammers, square rulers, and tape measures); and paid claimant from his own bank account, out of payment he had received from construction company. He also said amounts for workers' compensation insurance were taken out of his payment from construction company.

The carrier argues on appeal that the claimant did not meet his burden of proof to show that construction company was his employer pursuant to Article 8308-3.06 and the TWCC-83. Article 8308-3.06, which applies to contractors and workers working on structures not exceeding three stories or 20,000 square feet, defines "hiring contractor" and "independent contractor", and provides that the former has no obligation to provide workers' compensation insurance for an independent contractor or his employee, helper, or subcontractor. However, subsection (d) of Article 8308-3.06 provides in pertinent part as follows:

> An independent contractor and the hiring contractor may voluntarily enter into a written agreement whereby the independent contractor agrees that the hiring contractor may withhold the cost of workers' compensation insurance from the contract price and that, for the purpose of providing workers' compensation insurance, the hiring contractor will be the employer of the independent contractor and the independent contractor's employees. . . . The agreement shall be filed with the Commission by personal delivery or registered or certified mail. The agreement is deemed filed upon receipt by the Commission. The hiring contractor shall send a copy of the joint agreement to the insurer of the hiring contractor when the agreement is filed with the Commission. The agreement

> makes the hiring contractor the employer of the independent contractor and the independent contractor's employees only for the purposes of workers' compensation laws of this state and for no other purposes . . . .

The carrier argues that the testimony of Mr. H, along with the other witnesses' varying statements about when claimant met Mr. RC and whose idea it was to execute the TWCC-83, shows that Mr. RC is in fact claimant's employer, and not subcontractor. It also argues that, even if claimant were found to be an employee of subcontractor, various facts surrounding the execution of the TWCC-83 make it suspect and invalid. We find carrier's conclusions with regard to these two points to be based on circumstantial evidence, and that there was sufficient record evidence to support the hearing officer's findings that claimant was an employee of subcontractor on the date of injury, and that subcontractor and construction company on January 13, 1992, executed a TWCC-83 to establish an employer-employee relationship for certain building and construction workers. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34(e). The decision of the hearing officer will be set aside only if the evidence supporting the determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That is not the case here, where sufficient evidence supported the hearing officer's findings in this regard.

The carrier also contends that the hearing officer erred when she denied carrier's request at the hearing to keep the record open to obtain canceled checks issued to claimant which subcontractor testified at hearing that he had. Carrier contended on appeal, as it did at the hearing, that its process server was never able to locate subcontractor, and that neither claimant's attorney nor Mr. BC offered any assistance in locating subcontractor. Carrier further stated it could not have known about these documents before the hearing, as they were not provided to the carrier via discovery.

At the hearing, carrier called subcontractor as one of its witnesses. (Indeed, for that reason the attorney for the carrier objected to claimant calling subcontractor as a witness, and because the claimant had failed to identify subcontractor as a witness.) While on the witness stand, subcontractor, on direct examination, said he had "all the papers from the bank." The hearing officer, in questioning subcontractor, determined that he had never been contacted by the carrier nor asked to provide cancelled checks paid to claimant. The hearing officer then refused to allow time for further discovery, based on the amount of time that had already elapsed, and on the fact that Mr. BC as carrier's insured was required to cooperate with carrier. It was also noted that the TWCC-83, which was entered into evidence as a carrier's exhibit, contained the correct address for subcontractor.

In essence, the hearing examiner was refusing to continue the hearing to allow for further discovery by the carrier. It has been held that the decision whether or not to grant

a continuance is within the discretion of the hearing officer and will only be overturned for abuse of discretion. Gibralter Savings Association v. Franklin Savings Association, 617 S.W.2d 322 (Tex. Civ. App.-Austin 1981, writ ref'd n.r.e.). There was also no showing that carrier's lack of knowledge regarding the documents was attributable to claimant's noncompliance with any rules or procedures regarding discovery. Considering the facts as recited above, we find no abuse of discretion in the hearing officer's decision.

Carrier's final argument is that the TWCC-83 is not effective because there was no evidence that the claimant complied with the requirement that the agreement be filed with the Commission and sent to the insurer of the hiring contractor, pursuant to Article 8308-3.06. The carrier contends that the agreement, if valid at all, would not be effective until May 4, 1992, when it was filed with the Commission before the benefit review conference.

The evidence in the record is sketchy regarding the disposition of the TWCC-83 after it was executed. Mr. M stated that after he notarized the form he gave it to Mr. BC, and that he did not deliver a copy to carrier. He stated that he thought the form was filed with carrier, at a later date, but he did not know for sure. The report from the May 4th benefit review conference, which was admitted into evidence as a hearing officer's exhibit, states that the TWCC-83 was filed at the conference, and that a computer search revealed that no TWCC-83 had been filed with the Commission prior to that date.

As noted earlier, Article 8303-3.06(d) provides that the agreement "shall be filed with the Commission by personal delivery or registered or certified mail," and that the hiring contractor "shall send a copy of the joint agreement to the insurer of the hiring contractor when the agreement is filed with the Commission." No time limit for filing nor any provision stating the consequence of not filing the agreement are stated in the statute. Rules which implement this provision, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 112.201 (Rule 112.201) stipulate only that the agreement must be filed with the Commission and provided to the hiring contractor's workers' compensation insurance carrier within 10 days of the date of execution.

The evidence appears to show that the agreement was first brought before the Commission at the benefit review conference, which was more than 10 days after the agreement's execution. In determining whether an administrative agency intended a regulatory provision to be mandatory or directory, consideration should be given to the entire rule, its nature, objects and the consequences which would result from construing it each way. Provisions which do not go to the "essence of the act to be performed," but which are for the purpose of promoting the proper, orderly, and prompt conduct of business, are not ordinarily regarded as mandatory. Lewis v. Jacksonville Building and Loan Association, 540 S.W.2d 307, 310 (1976). The same has been held to be true with regard to the Legislature's enactment of statutes. If a statute directs, authorizes, or commands an act to be done within a specified time, the absence of words restraining the doing thereof afterwards or stating the consequences of failure to act within the time specified, may be

considered as a circumstance tending to support a directory construction. Chisholm v. Bewley Mills, 287 S.W.2d 943 (1956).

This case involves a statute with a filing requirement indefinite in terms of time, amplified by rules providing for filing within a 10-day period. We cannot see how these requirements go to the "essence of the act to be performed," which is a voluntary agreement between parties involved in certain construction projects to provide for workers' compensation coverage. Had the Legislature, or the Commission in adopting its rule, intended to state a consequence of not timely filing such agreements, they could have done so. In this regard, we observe that the TWCC-83 "Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers" contains the statement that "This declaration takes effect upon receipt by the Texas Workers' Compensation Commission." No such caveat applies to the "Agreement to Establish Employer-Employee Relationship for Certain Building and Construction Workers."

Based on the foregoing, we find no error in the result reached by the hearing officer. The decision and order of the hearing officer is accordingly affirmed.

_____
Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

CONCURRING OPINION:

In my opinion, this case does not necessitate an interpretation of the statutory requirement to file a copy of the agreement.

The accident happened one day after the agreement was made and, since the Commission rule gave the parties 10 days to file, they had not failed to follow the statute or rule at the time of the accident. That they thereafter did not meet the time frame of the rule should not control in this case. I reserve any comment as to the outcome should an agreement such as this be made, but not be filed, at the time of an accident that happens over 10 days after execution of the contract.

_____
Joe Sebesta
Appeals Judge