APPEAL NO. 931000

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On October 4, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue agreed upon at the CCH was: "Who was the Employer on the date of the accident of (date of injury)?" The hearing officer determined that claimant was the employee of (EMPLOYER), sole proprietor, or (employer)., on (date of injury), and was not an employee of either (business). or RR. (The hearing officer in her Decision and Order consistently refers to RR. Several exhibits, including an affidavit, indicate this individual's name is RR. For purposes of this decision we refer to the individual as RR).

Appellant, claimant, herein, contends that the hearing officer erred and that claimant was under the direction and control of the partnership of (EMPLOYER) and RR. Claimant requests that we reverse the hearing officer's decision and render a decision that claimant was an employee of RR. Respondent, Carrier A herein, responds that the decision is supported by the evidence and requests that we affirm the decision. Respondent, The Carrier T herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

By way of identifying the players in this case, (Contractor herein) is the builder of new homes. The Contractor contracted out the framing of those houses to a subcontractor who was required by the contract to carry workers' compensation insurance. The Contractor had workers' compensation coverage with Carrier T. It is claimant's contention that ((EMPLOYER)) and RR were partners and that they jointly contracted to do the framing for the Contractor. A certificate of insurance for a workers' compensation policy with Carrier A, naming RR as the insured for "carpentry - private residence" was issued. It apparently was this policy that was used to satisfy the Contractor that the framing subcontractor had workers' compensation coverage.

Claimant testified that he was hired after he spoke with (JP), (EMPLOYER)'s brother, by telephone, and that JP told claimant to report to a particular job site the following day. Claimant said that some three days later (EMPLOYER) brought the paperwork (W-4 form and other) necessary to place claimant on the payroll to him at the job site. It was claimant's undisputed testimony that (EMPLOYER) furnished screws, nails and other material for the job, set the starting and quitting times and that claimant was paid by (EMPLOYER) by check drawn on the account of (employer). Claimant said he was required to supply his own tools. The hearing officer found in her statement of evidence, and is supported by the evidence, that claimant was unaware that RR may have been an owner or part owner of "the company" until after his date of injury on (date of injury). Claimant testified he saw RR less than five times during his six weeks of employment. Claimant further testified on one occasion RR gave him instructions regarding his job as a carpenter's helper. Claimant however, said

everyone was telling everyone else what to do on the job, and as a labor and carpenter's helper he was low man on the totem pole. Claimant stated he noticed that RR would come to work late and leave early and that on one occasion he saw (EMPLOYER) and RR leave together. Claimant testified he had never spoken to RR about workers' compensation coverage nor did he report his injury to RR.

On the day of the injury, (date of injury), claimant stated he had been carrying lumber with another helper who left for lunch at 11:30. Claimant testified he was carrying some 2 x 10 (two-by-ten) and 2 x 12 (two-by-twelve) boards when he was injured. Claimant left work that day at about 1:30 p.m. which was just as RR was arriving. Claimant testified he had two herniated discs at L2-3 and L5-S1 and this injury had been confirmed by an MRI and a discogram. Claimant testified that another carpenter who worked for (EMPLOYER) had directed him to move the boards he was working with when he was injured. Claimant testified he reported his injury to (EMPLOYER) on (date) and (EMPLOYER) purportedly said "I am not going to cover you." After claimant retained counsel, he said (EMPLOYER) contacted him and that claimant gathered from the conversation that "He was going to cover me." Claimant agreed he was never supervised by any of the Contractor's superintendents.

(Mr. B), Contractor's comptroller, was called by claimant and testified that "It is his understanding that (EMPLOYER) and RR were partners." Mr. B states he has never met or spoken with RR although he has talked with (EMPLOYER). Mr. B "assumed" that (EMPLOYER) and RR were partners and that the framing was being done by (EMPLOYER) and RR as partners. Mr. B bases this assumption on the contract between the Contractor and subcontractor, the signature block of which states:

[RR Hand Printed Signature]	[Contractor]
Subcontractor/Vendor	Builder
[(EMPLOYER) Hand Printed Signature]	[Contractor's Signature]
By:	By:
[Owner Hand Printed]	
Title	Title

Although a subpoena was issued for RR's attendance and business records at the CCH, RR could not be located. An affidavit from RR states he is an employee of (EMPLOYER) Construction Company. (EMPLOYER) did not testify at the CCH but a transcribed telephone statement was offered and admitted. In that statement (EMPLOYER) said that he worked for RR. (EMPLOYER) also stated he worked for two other well known area builders in addition to RR. (EMPLOYER) concedes he paid

individuals that worked for him and that he had seven or eight employees. (EMPLOYER) stated he had a verbal understanding with RR that if any injury occurred ". . . his (insurance coverage) would cover it."

Claimant has filed suit in the District Court against (EMPLOYER) and (employer) alleging he was an employee of (EMPLOYER) and/or (employer) who was not a subscriber to the Texas Workers' Compensation Act.

Claimant's position at the CCH, and on appeal, was that he was an employee of (EMPLOYER) and RR as a partnership and that RR's workers' compensation coverage covered him. Carrier A's, RR's workers' compensation carrier, position is that it only insured RR as an individual and did not insure (EMPLOYER) or his employees; that it was unaware of (EMPLOYER) and had no knowledge of any relationship between (EMPLOYER) and its insured RR; and that RR was the only person covered by his workers' compensation policy.

The hearing officer found in pertinent part:

FINDINGS OF FACT

8. The carpentry work on the [Contractor], Inc. building project was accomplished by [(EMPLOYER)] in his capacity as either a sole proprietor, who employed a number of persons who worked as carpenters, roofers, and carpenters' helpers, or in his capacity as the operator of [employer]. which employed a number of persons who worked as carpenters, roofers, and carpenters' helpers.

12. The relationship of [(EMPLOYER)] and [RR] cannot be determined from the evidence presented.

13. On (date of injury), the Claimant was directed to carry boards from one location to another by RF, an employee of either [(EMPLOYER)], sole proprietor, or [(EMPLOYER)] , on the job site of [Contractor], Inc.

14. The Claimant was paid by [(EMPLOYER)], sole proprietor, or [(EMPLOYER)] , on (date of injury), and was under the direction and control of an employee of [(EMPLOYER)], sole proprietor, or [(EMPLOYER)] , on (date of injury).

15. The Claimant was not employed by or under the direction and control of [Contractor], Inc., on (date of injury).

16. The Claimant was not employed by or under the direction and control of [RR] on (date of injury).

CONCLUSIONS OF LAW

3.[(EMPLOYER)], sole proprietor, or [(EMPLOYER)]., was the Claimant's Employer on (date of injury).

4.[Contractor], Inc. was not the Claimant's Employer on (date of injury).

5.[RR] was not the Claimant's Employer on (date of injury).

Claimant appealed contending that the framing sub-contract establishes that RR "was the entity that would be solely responsible for the carpentry work on homes it was constructing"; that Mr. B's "unrefuted nor contradicted" testimony was that RR and (EMPLOYER) were in a partnership and the partnership was going to be responsible for performing certain work; and "that the subcontract bears both names of (RR) and ((EMPLOYER))." Claimant contends that claimant "was being paid by one of the partners of said partnership between ((EMPLOYER)) and (RR), being the partnership entity responsible under said subcontract."

A claimant in a workers' compensation case generally has the burden of proof of the existence of an employer-employee relationship. Bewley v. Texas Employers' Insurance Ass'n, 560 S.W.2d 147 (Tex. Civ. App.-Houston [1st Dist.] 1977, no writ). Texas Workers' Compensation Commission Appeal No. 92035, decided March 13, 1992. Claimant's testimony and the evidence indicates claimant was hired by (EMPLOYER), paid by (EMPLOYER) with (EMPLOYER) checks, materials were provided by (EMPLOYER) who set hours and was generally looked to by the Contractor for corrections of improper work. It would appear from the evidence and testimony that claimant barely knew RR who only appeared as another carpenter. The hearing officer's finding that claimant was not employed by or under the direction and control of RR is certainly supported by the evidence.

Claimant relies heavily on the subcontract and Mr. B's "assumption" of a partnership between RR and (EMPLOYER). However, while the subcontract had RR's name on it there is no evidence that RR signed the contract or agreed to have his name put on it by someone else or that he was in any partnership or other business relationship with (EMPLOYER). Mr. B testified he had never spoken with RR and that all his dealings were with (EMPLOYER). While Mr. B was free to make his assumptions and was under the "impression" that a partnership existed between RR and (EMPLOYER), there is a lack of any probative evidence of this fact. Even if we were to assume that the hearing officer could have possibly found that such a partnership existed, based upon Mr. B's interpretation and "understanding," the fact is that she did not. As an appellate body we will not substitute our judgement for that of the trier of fact even if there is evidence that could reasonably support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

Carrier A points out that even if a partnership existed, Carrier A had only issued a workers' compensation policy to RR, rather than RR and (EMPLOYER) as a partnership. Certainly there is no evidence that claimant was an employee of RR individually. Whether an individual partner in a partnership is an employer for the partnership's employees, for purposes of the Texas workers' compensation law, may be a different matter. *See* Texas Workers' Compensation Commission Appeal No. 93161, decided April 21, 1993. Had a partnership existed, an entirely different problem would have resulted, and we do not necessarily accept Carrier A's proposition that since it only insured RR an employee of a partnership would automatically be excluded.

Carrier A also alleges that claimant, in a District Court cause of action, is asserting he was an employee of (EMPLOYER) and/or (EMPLOYER) in order to avail himself of the employer's waiver of common law defenses in a negligence action, while at the same time, in this action, attempts to avail himself of workers' compensation benefits under RR's workers' compensation policy. Carrier A contends that claimant is judicially estopped from taking these two contradictory positions. Not finding it necessary to rule on whether the doctrine of judicial estoppel applies, we decline to do so, noting only that Carrier A's citation of Coleman v. Lumberman's is incorrect.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find and consequently the decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge