APPEAL NO. 931036

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. §401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On October 14, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues determined at the contested case hearing were whether claimant, TS, who is the respondent, was the employee of (employer)., on his date of injury ((date of injury)), for purposes of workers' compensation insurance coverage, and whether the carrier had timely contested the compensability of claimant's injury. There was no dispute that claimant was injured when involved in a traffic accident in a truck owned by (employer), in the course of transportation to or from an installation of that company's merchandise.

The hearing officer determined that claimant was the employee of (hereinafter Company T), rather than (hereinafter Company R), which did not have workers' compensation coverage, and that the carrier for Company T was liable for benefits. The hearing officer also determined that the carrier had waived its right to contest compensability of the claim.

The carrier has appealed. On the waiver issue, carrier doesn't assert that the facts prove that it timely contested the claim, but argues that claimant failed to carry his burden to prove that it did not. On the employment issue, the carrier argues that a contract between Company T and Company R disposes of the right of control such that the trier of fact need not go behind the document to ascertain who had actual control over the claimant. The carrier also argues that the facts show that Company R, and not Company T, had actual control over claimant's work. The carrier argues that the only way claimant could prevail is to show that the contract between the companies was entered into with the intent to avoid liability of Company T as an employer.

DECISION

We affirm the hearing officer's decision.

WHETHER THE HEARING OFFICER CORRECTLY DETERMINED THAT CARRIER WAIVED ITS RIGHT TO CONTEST COMPENSABILITY

Either issue is dispositive of liability in this case. We turn first to the issue of whether the carrier waived its right to contest compensability.

The findings of fact and conclusions of law made by the hearing officer concerning the carrier's dispute of compensability are as follows:

FINDINGS OF FACT

9.[Carrier] was notified of the claimant's work-related injury of (date of injury), at the latest, by April 2, 1993, but it did not prepare a TWCC-21 Form

controverting the claim until June 21, 1993.

CONCLUSION OF LAW

4.The carrier waived its right to contest the compensability of the claimant's injury under the Texas Workers' Compensation Act.

The carrier argues on appeal that because the claimant did not argue that the claim was improperly controverted, and did not prove that the TWCC-21 in evidence was the only one filed, he failed to meet his burden. This argument is without merit. The issue was properly before the hearing officer as an unresolved issue from the benefit review conference, and was properly decided as such. One cannot review the record and come to any conclusion other than that the claimant clearly asserted that the first notice of a disputed claim that he received from the carrier was the first one he was given.

In its appeal, the carrier, although it alludes to the prospect that an earlier dispute of claim than the one in the record was filed, does not assert that a timely dispute of claim was filed. Nor was this asserted during the hearing, although proof of same would have made short work of claimant's contention that a timely dispute was not filed. This vagueness is manifested by the Form TWCC-21 itself, which leaves blank the portion of the form that specifically asks when the date of first written notice of injury was received. The portion of the form that inquires as to the name and title of the person notifying the carrier is completed as "TWCC BRC notice." This form was created June 21, 1993, but was not filed with the Commission until June 24, 1993.

At the hearing, testimony from carrier's witness (Ms. L), the Company T president, indicated that a benefit review conference (BRC) had been attempted on May 12, 1993. She stated that at that benefit review conference the adjuster indicated that he first knew of "the claim" when he received the setting notice for the benefit review conference. This BRC apparently was postponed, according to Ms. L, when claimant indicated he wanted representation. The BRC that was the predecessor to the contested case hearing occurred June 24, 1993.

There was no adjuster in attendance at the contested case hearing, so the hearing officer asked the attorney for the carrier what date he contended his client had received this notice. The attorney for the carrier responded that as it was his client's position that claimant had the burden, he had no response to the hearing officer's question. The hearing officer then stated that she would take official notice of the claims file, and only notice items listed in her decision.

The facts pertaining to notice in the record are as follows:

- Claimant's doctor, (Dr. E), filed an initial medical report (TWCC-61) and this was received by the Commission on January 19, 1993. This report clearly identifies the carrier, Company T as the employer, the claimant, the date of injury, the facts underlying the accident, and the nature of claimant's physical

injury.

- On January 18, 1993, the Commission received a claim for compensation from claimant. (This was dated by claimant as "2-15-93," but as the Commission's date stamp clearly indicates the January 18th date, this appears to us to be a human "typo"). The claim indicated the identity of the employer as Company T, and identified the circumstances, nature, and date of injury.

- On February 1, 1993, the Commission created letters notifying the employer and the carrier of the filing of the claim. A copy of the letter to Company T, dated February 3, 1993, is in the record and Ms. L stated she received it.

- A computer log entry from the Commission dated April 3, 1993, indicated that an employee of the Commission spoke about the claim with a representative from "CNA" on that date and ascertained that it was their position that claimant was not Company T's employee. This entry further indicated that a TWCC-21 had not been filed as of that date.

The attorney for carrier identified CNA as the holding company for a number of insurers, of which the carrier was one.

As the appeal speaks in terms of a "thirty" day filing period for disputing a claim, and argues that the burdens are wholly on the claimant to prove carrier's compliance with those deadlines, a brief review of applicable law and rules is in order.

A "compensable injury" means an injury that arises out of the course and scope of employment for which "compensation" is payable. Section 401.001. "Compensation" means payment of a "benefit," which is defined to include "a medical benefit." Sections 401.011(5) & (11).

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6) has to do with the responsibilities of the carrier to file a timely and adequate dispute of a claim. Rule 124.6(d) makes clear that a dispute that compensation is not due must be filed "no later than the 60th day after receipt of written notice of injury." Rule 124.6(a) requires the notice to be filed on a TWCC-21 form which "shall" contain information to include "the date the carrier received written notice of the injury . . . ." Rule 124.6(a)(7).

It must be noted that the carrier may not defer its response until an actual claim is filed, but must react to "written notice of injury." Rule 124.1(a) lists those documents, the "earliest receipt" of which will be considered as such:

(1)the employer's first report of injury;

(2)the notification provided by the commission under subsection (c) . . .; or

(3)any other written document, regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of injury, and facts showing compensability.

The Commission notification referred to is a written document generated, according to Rule 124.1(c), when the agency receives information from a source other than the carrier that an injury has occurred in which the claimant has sustained either an impairment or eight days or more of disability.

Effective March 1, 1993, subsection (d) was added to Rule 124.1:

For purposes of this title, the carrier shall be presumed to have received notice on the date the commission received written notice required by the Act or commission rules to be filed with the carrier and with the commission. The carrier has the burden of proving that it did not receive or timely receive the written notice.

We believe that the reference to burden of proof, an evidentiary matter, shows that subsection (d) shall be used to resolve disputes that arise over written notice of injury. As such, it is a procedural rule, and in our opinion applies to the dispute at hand. *See* Texas Workers' Compensation Commission Appeals No. 92247, decided July 27, 1992, *citing* Brooks v. Texas Employers' Insurance Ass'n, 358 S.W.2d 412 (Tex. Civ. App.- Houston 1962, writ ref'd n.r.e.)[1] *and* Texas Dept. of Health v. Long, 659 S.W.2d 158 (Tex. App.- Austin 1983, no writ).

In line with this, we would observe that Rule 133.101 requires the treating doctor to submit the Initial Medical Report (Form TWCC-61) to both the carrier and the Commission.

These rules implement and interpret the underlying statute, Section 409.021 (previously Article 8308-5.21), which states, in pertinent part:

(c)If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60 day period.

This statute is also noted by Senator Montford, in A Guide to Texas Workers' Comp Reform:

[1]As stated in Brooks, pg. 414: "'Procedure' is the machinery for carrying on the suit, and it includes pleading, process, evidence, and practice . . . ."

Commentary, Section 5.21 . . . . As compared to the prior comp law, Section 5.21 significantly accelerates processing time for carriers either to initiate benefit payments . . . or to contest compensability. Promptness of the initial comp payment was considered an important reform objective since delays in initiating benefits under the prior law at times resulted in hardship upon the employee and/or a need (viewed from the employee's perspective) for early attorney involvement.

Finally, we note that relating to the carrier's TWCC-21 notation that it received notice through the Commission's setting of a BRC, Rule 141.1(e)(1) requires the Commission to provide notice of a BRC "at least" 30 days in advance of when it is scheduled to occur.[2] Ms. L testified that the adjuster told her at a May 12, 1993 conference that he had first heard of the claim through the set notice. The notice for a May 12th BRC would have been required to be sent no later than April 12, 1993.

There is more than sufficient evidence to support the hearing officer's determination that the carrier waived its right to contest compensability. She evidently concluded that the conversation documented on April 3, 1993, was reflective of the fact that the carrier had received written notice. Written notice to the carrier (and not its holding company) is indicated on at least two occasions: presumed receipt of the initial medical report by the carrier on January 18, 1993 (which report passes muster as a "written notice of injury" in accordance with Rule 124.1 (a)(3)), and notice by the Commission to the carrier in early February of filing of a claim. This evidence alone was enough to meet claimant's burden of proof and shift it to the carrier to demonstrate that it indeed filed a dispute within sixty days after receiving written notice of injury.

To the extent that the carrier did not commit itself to a date that it received written notice, the facts and application of applicable rules indicate that the BRC notice issued more than sixty days before the filing of the TWCC-21 (June 24, 1993).

The direct information of actual receipt of written notice would be contained within the claims file of carrier. Carrier has not been forthcoming with this information, arguing instead that claimant has the burden to prove this. This was also the gist of its attorney's response to a direct question by the hearing officer as to the date carrier claimed it received the notice as described on its TWCC-21. Of course, carrier <u>now</u> has the burden of proof should it appeal this matter to district court. Section 410.303.

WHETHER THE HEARING OFFICER ERRED IN DETERMINING THAT COMPANY T WAS CLAIMANT'S EMPLOYER FOR PURPOSES OF WORKERS' COMPENSATION INSURANCE COVERAGE

[2]In the absence of any proof, allegation, or assertion that the May 12, 1993, BRC was an expedited BRC, we will assume that it was a regular BRC.

The waiver of the right to contest compensability has the effect, in our opinion, of a confession of compensability. However, we believe that the hearing officer's determination as to the merits of the other issue, the identity of claimant's employer for purposes of worker's compensation, also has sufficient support in the record.

Claimant testified he worked for Company T approximately a year and nine months prior to his injury. He stated that he had been hired by (Mr. M) on behalf of Company T. He stated that he took direction from Mr. M as to the projects he was to work on. He understood that Company T sold office furnishings which he installed. Records in the file indicate that claimant signed documents in which he indicated that he worked for Company R, which he said was a company set up for payroll purposes to pay installers. He stated that there had been at least two other such companies prior to Company R's names being on his paychecks. The record indicated that claimant supplied his own hand tools and rented a uniform with Company T's name on it, but that other equipment was supplied by Company T (as opposed to Company R).

The claimant said he was terminated by Mr. M on January 25, 1993, when he took a doctor's notice to him.

Ms. L stated that she had started Company T eleven years ago, and had been out briefly for a period of time relating to the birth of her child. She stated that she returned to Company T in 1991 and served at times as either vice-president or president. She stated that she believed in 1989 the decision was made to stop doing installation of its office furniture and to subcontract out this function, and retain in Company T only the sales and clerical functions. A person employed by Company T indicated he wanted to venture out into this installation business and did so. A second company, managed by a person identified by a witness as Ms. L's sister, had also provided this service to Company T prior to formation of Company R. Ms. L speculated that the reason to go this route may have had to do with cost effectiveness and the desire not to manage so many employees. She denied the purpose was to curtail Company T's workers' compensation obligations.

Ms. L stated that Company R was formed in July or August of 1992 to perform installation services. Ms. L identified the president of Company R as (Mr. E), and the owner of the company as Mr. M. She stated that Mr. M was also an officer and employee of Company T. Ms. L stated that out of her concern that Company R did not have workers' compensation, Company T hired an attorney to draw up an agreement to ensure the separate identities of the companies so that she could avoid going through the very thing she was going through on claimant's claim. Ms. L confirmed her understanding that this agreement had been approved by the carrier, and said she understood that Company R covered its employees through a comprehensive ERISA benefit plan.

Ms. L stated that Company R occupied an adjoining space of the building rented by Company T. She stated that while there was no rent check as such paid by Company R, that it in effect paid rent to Company T through a reduced management fee charged to Company T. (She characterized this as less than Company R otherwise would charge, although there was no evidence that Company R performed services for anyone but

Company T). She stated that Company T contracted with other companies also to do installation. She stated that the wearing of company uniforms by subcontractors was common in her industry to ensure access of those persons onto customers' locations. She confirmed that Company T owned the delivery trucks used by Company R.

Mr. E was called as a witness by the claimant. He said that on the date of the claimant's injury he was the "quote unquote president" of Company R. Mr. E testified emphatically that Company T and Company R were one and the same, and that he took direction from Ms. L's husband (this was denied by Ms. L). Mr. E stated he never took action without approval from Company T. He stated that Company T picked up expenses of Company R, and that Company R never got its own mail, and did not have a sales staff or bookkeepers of its own. According to Mr. E, Company R did not advertise or offer its services to any other company. Mr. E stated his impression that the two companies were separate for tax or insurance purposes only. Mr. E said that payroll checks for Company R were set up on the computer by Mr. M and then "run" over the weekend by Ms. L or her sister. He agreed that at one point he had been authorized to sign paychecks for Company R. Mr. E said that claimant had been hired by Mr. M, and that when the company name changed, everyone had completed a new application.

Mr. E stated that he had been employed for eight and a half years by Company T, and had been terminated for the stated reason that he failed to pass a drug test. There was evidence of at least one occasion in which Mr. E initiated a personnel-related action regarding claimant.

Mr. M stated that he was a dual employee of both companies. He stated that his job duties for Company T were to coordinate the jobs, and meet with salespeople to determine the manpower needed to accomplish installation in the time frames required by the customer. He stated that his job duties for Company R (which he also owned 100%) were to provide the labor necessary to accomplish installation. He stated that there was an overlap and it was necessary for him to work for both companies to get the job done. Mr. M stated that he kept the two companies (which were separate corporations) separated. He stated that Company R provided, in lieu of workers' compensation insurance coverage, an ERISA plan. He stated that it was equal to or better than workers' compensation, and actually paid medical and income benefits to claimant following his injury. Mr. M said that all employees, including claimant, signed acknowledgements that they were not covered by workers' compensation and agreed instead to accept the ERISA plan (claimant's is in evidence). This plan required injured employees to attend regularly scheduled appointments with a plan doctor, and that claimant lost both his medical benefits and income benefits under the plan when he failed comply. He agreed that he assumed administration of the ERISA plan on claimant's case, but did so in the capacity of Company R's owner. Mr. M testified that either he or Mr. E directed the activities of Company R employees, depending upon availability.

Mr. M stated that Company R was dissolved after Mr. E's termination. He stated that he now ran PDM Installers, which did installation for Company T.

The written agreement signed by Mr. E (for Company R) and Ms. L for (Company T), effective September 1, 1992, contains numerous disclaimers of an agency relationship between the two companies. It expressly disclaims any joint venture or partnership. It describes both companies as independent contractors with respect to each other. It states that Company R shall supply all tools. Company R is given sole control over all its employees.[3] It reserves sole liability for providing benefits to persons injured in the course and scope of employment. It purports to govern the ongoing relationship of hiring Company R to do specific tasks, but the agreement itself sets out no specific terms regarding the amount to be paid or the method of invoicing. It reserves to Company T sole right to determine the adequacy of Company R's performance of work. Company T agrees to indemnify Company R in connection with customer contracts or any other vendors or contractors of Company T. It is effective for a term of ten years and renewable in one year terms thereafter. It purports to be the entire agreement between the parties.

The impression from reading the contract is that it extensively describes the separate identities of the companies, with very few provisions concerning the installation work for which Company R is hired. Because it is to be incorporated into the terms of specific jobs for which Company T may hire Company R, it is more a blanket agreement.

The carrier argues that "[a]ny intermingling between the companies is irrelevant unless the claimant can specifically show that the companies were set up to avoid payment of workers' compensation benefits to him." We do not agree that this is a correct statement of the law. The provision cited by claimant in support of this, now codified at Section 406.124, does not, we feel, establish a burden of proof but merely a separate cause of action against a subcontractor in the event a subcontract is proven to have been transacted with the intent of avoiding liability as an employer. While we note that Ms. L testified that her reason for forging the written agreement itself was to "avoid" the type of action she was currently going through with respect to this claim, we do not believe that the hearing officer was required, under the facts of this case, to affirmatively find intent to avoid liability in order to set aside the agreement in this case. The very Appeals Panel case that carrier attaches to its appeal is one of several that stand foursquare for the proposition that the trier of fact is not necessarily bound by recitations in a contract as to who is and who is not an employee, but may look to facts and circumstances surrounding a transaction to determine right of control. *See* Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964); and Highlands Underwriters Inc. Co. v. Martinez, 441 S.W.2d 666 (Tex. Civ. App.- Waco 1969, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93053, decided March 1, 1993. This is especially true when one party to the contract testifies that the contract did not reflect the actual relationship of the companies to a claimant, as Mr. E did here. Texas Workers' Compensation Commission Appeal No. 92116, decided May 14, 1992. Whether a person employed by one company has become the borrowed servant of another is ordinarily a question of fact. Sparger v. Worley Hospital Inc., 547 S.W.2d 582 (Tex. 1977).

[3]In its appeal, the carrier argues that paragraph "1.4" of the agreements covers a common employee situation. However, the contract in the record contains no such paragraph 1.4.

Carrier argues that the written agreement here falls within Sections 406.121 through 406.127 (previously Art. 8308-3.05). However, we would point out that 406.122 indicates that the written agreement is only one part of the equation for finding that a subcontractor's employees are not the employees of a general contractor. The subcontractor must also be "operating as an independent contractor . . . ." Section 406.122(b)(1). We believe that, under the facts in this case, the hearing officer's determination that Company T continued to exercise supervision and control over claimant goes to the second element of whether Company R operated as, and not merely called itself, an independent contractor.

For these reasons, the determination of the hearing officer is affirmed.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge