

APPEAL NO. 931143

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly V.A.C.S., Article 8308-1.01 *et seq.*) (1989 Act). A contested case hearing was held in (city), Texas on November 2 and continued until November 12, 1993, with the record closing on that date, to determine the issue of whether the claimant was employed by (employer) on (date of injury). Hearing Officer (hearing officer) decided the issue in favor of the claimant. The carrier appeals, citing evidence from the record which it says establishes that no employment relationship existed. The claimant responds that the hearing officer's decision should be affirmed.

DECISION

We affirm the hearing officer's decision and order.

The claimant was hired by (employer) in (month year). He injured his back on (date of injury), when he fell from a ladder while installing an exhaust hood at the (hereinafter "cafe").

Claimant testified through a translator that he was hired by (Mr. H), employer's owner and president, and that he was initially paid by check but about eight or nine months after he was hired he began getting his payment in cash from (Mr. O), whom he described as employer's "manager." Every day from (month year) until the date of injury, he reported to (address), where he and other workers were then taken in trucks to job sites. On the date of his injury he said he was taken in a (business)truck from (address) to the cafe, where he worked under Mr. O's supervision. He said the building at (address) had a sign outside that said "business" and something else that he could not remember.

The claimant denied that he had ever been terminated by employer. He said Mr. H had spoken to him about his difficulty in communicating with customers, but denied that Mr. H had fired him for that reason.

It was Mr. H's testimony that he had hired claimant in (month year), but that he terminated him a few weeks later because claimant did not have English language skills sufficient to communicate with customers, as he had represented earlier. He also denied that employer did business at (address) or that it directly, or through a contractor, performed the work done at the cafe on (date). However, employer's yellow pages ad gave employer's business address as (address); Mr. H stated that he had used this address for three years because he was considering buying the property, and that he paid "rent" and taxes on that location but did not transact any business inside the building except for an occasional telephone call, meeting his workers on the sidewalk outside of the building every morning. He said there was a sign on the building that said "(business)Sheet Metal," which was not part of his business.

Introduced into evidence was a city permit to install a hood and duct at the cafe, with

the contractor listed as "business" and signed by "W H." Mr. H nevertheless stated that his company was not involved in this job, and that he had allowed Mr. O to do work under this permit; he said he had also allowed Mr. O to use employer's truck on occasion. Also made part of the record was an invoice showing \$190.00 billed to "H" for duct work. Mr. H stated that this could not have involved the work done on (date), which he said was a job which would have cost \$3000-4000.

Mr. H stated that Mr. O was his employee and had worked for employer during the period of (month year) until the latter part of that year. He said Mr. O stopped working for him in order to pursue his own business. He also said he did not believe he ever told claimant that Mr. O was no longer an employee.

(Mr. JO) testified that he is Mr. O's son, that he was self-employed and hired claimant "for a couple of days" and paid him in cash to do the cafe job at which the claimant was injured, and that neither his father nor Mr. H were involved in this job, although he acknowledged that the work was being done under the permit issued to Mr. H. He could not remember how much he was paid to do the job, but estimated it was about \$200.

(Ms. T) testified that she has been employer's office manager for twelve years; that claimant was employed for about three weeks beginning in (month year) but that he had been terminated; and that Mr. JO had never been employed by employer. In response to questions on cross-examination she said that employer paid for a telephone number for Mr. O, but that according to her records employer had not been reimbursed by Mr. O for any of the expenses associated with the property at (address).

After hearing this evidence the hearing officer determined that claimant was employed by employer on (date of injury), and he ordered the carrier to pay medical and income benefits in accordance with the 1989 Act. Indisputably, this case was one which turned upon the credibility of the witnesses and the evidence. As the 1989 Act provides, the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). Where, as here, the testimony of the witnesses was in direct conflict, the hearing officer could choose to believe claimant's testimony that his employment relationship with employer was a continuing one that had never been terminated, over the testimony of carrier's witnesses that claimant had not worked for employer since April or May of 1992. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1987). No doubt the hearing officer believed claimant's testimony was buttressed by such documentary evidence as the city permit in employer's name issued for the job on which claimant was injured, carrier's witnesses' testimony to the contrary notwithstanding. We do not substitute our judgment for that of the hearing officer if the challenged decision is supported by evidence of probative value and is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Lynda H. Neseholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge