APPEAL NO. 94358

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 19, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) suffered an on-the-job injury, but that it was not compensable and the claimant did not have disability, because his employer, (JM), was a nonsubscriber under the 1989 Act. The claimant appeals this decision and contends that the evidence establishes that he was never an employee of JM, but that at the time of his injury he was the employee of the respondent (self-insured) and is entitled to workers' compensation benefits. The self-insured replies that the decision and order of the hearing officer are correct as a matter of law and supported by sufficient evidence.

DECISION

We affirm.

It was not disputed that the claimant suffered an on-the-job injury to his arm and back on (date of injury), when he fell while scraping tar off a tank. The critical issue is who was his employer. The injury occurred on a job site at (city), Texas. According to the claimant's testimony, he was hired in August or September 1992, as a general laborer and welder's assistant by (BA) who worked for (employer), as their site manager for all projects at the air base. It was agreed that (employer) was a wholly owned subsidiary of (employer), a self-insured employer under the 1989 Act. At the time of his hiring and through most of 1992, the claimant testified that he was an employee of (employer) (MZ) handled the payroll and his name was on the paychecks.

Some time before Christmas 1992, (employer) entered into an agreement with Manpower, Incorporated (Manpower), an employee leasing company. The claimant said that he and other employees of (employer) at that time filled out the necessary paperwork to become employees of Manpower. This arrangement continued, according to the claimant, until mid-(date of injury) when BA announced that Manpower was withdrawing from its agreement with (employer) to lease employees. The claimant testified that BA told the employees at a changeover meeting some two or three days before his accident that they could continue employment with(employer), in which case they would no longer work at the (employer) job site and could take their chances with being placed wherever Manpower could find work for them, "or we could keep our job and [JM] would be paying us instead of [MZ]." The claimant decided to "keep" his job at the (employer) site. JM, who did not testify or provide any statements introduced at the hearing, had been working at the job site on the air base "for a long time."[1] The claimant said no paperwork was filled out between he and JM, and none was in evidence reflecting the relationship between JM and his employees or between (employer) and JM. JM did not carry workers' compensation insurance.

[1] Purported written statements of Mr. JM were offered into evidence, successfully objected to by the claimant for lack of timely exchange and ultimately withdrawn by the carrier.

The accident occurred about two days after the changeover. The claimant testified that the only one present at the time of the injury was a coworker, (JI). At a break about 30 minutes after the accident, the claimant said he told (RB), an employee of (employer) and the job manager, that he hurt his back, but RB only made a joke about it. Later, he said BA came by and asked the claimant what happened. Since it was near quitting time, the claimant said BA told him to go home and see how he felt in the morning. About the third day after the accident, he said he called in to tell JM that he could not make it into work and asked JM all that week to see a doctor. He said he came in on the following Monday to tell JM he needed to see a doctor. He said that BA and JM discussed it and they agreed. He met JM at an emergency clinic. He went back to the clinic the next day and then to a rehabilitation center on July 6, 1993, because, he said, JM told him the clinic was too expensive and (employer) would not pay for it. Because his physical therapist believed the claimant's back condition was serious, the therapist, according to the claimant, recommended more medical care. He said he talked to both BA and JM about this and they kept putting him off until Mr. JM said "they" were not going to pay anymore. The claimant said he next talked to the air base contracting officer who then "jumped on" BA. He said BA then called the claimant to tell him "they" would take care of him on the condition he sign a statement (which he did) to the contracting officer which read:

To contracting officer:

Since we last spoke, I have talked to [BA] and [JM] and (date of injury), and they have worked something out with me and will pay me and take care of medical expenses.

The claimant said he received weekly checks for an unspecified time for $200.00 from JM who described them to him as what would otherwise be his workers' compensation benefits. The claimant, at JM's suggestion, went to (Dr. W), D.C., on August 2, 1993, who told the claimant that an MRI examination was needed for a complete diagnosis. According to the claimant, JM refused to agree to pay for this and the checks stopped. The claimant said that JM told him that BA was letting JM submit extra hours to cover his medical expenses, but had drawn the line at paying for more tests.

As to the employment relationship itself, the claimant testified that every morning up to the changeover, he got his daily tasking from BA. On the day after the changeover, he said that BA told him and JI to continue working on the tank where they had been. The claimant said he got all his tools, except the grinder which he was using at the time of the accident, from a (employer) trailer and that every hour, RB would come by to see how things were going. He said it was RB who told him to borrow a grinder to do the tank scraping. He said that JM never gave him instructions except when he was helping JM as a welder's assistant. He said that he took orders from BA and RB, as well as from (JC), all of whom worked for (employer). He said that JM was to be considered his supervisor only when BA was not around. He said that he was not told at the changeover meeting from Manpower to JM, that (employer) was doing the hiring, but only that they would be paid by JM. He stated that BA, not JM, directed him to remove the tar from the tank. He also testified that

at the changeover meeting, JM told the employees that he did not carry workers' compensation insurance, but was in the process of getting it; that he would take them to the emergency clinic if they got hurt; and that if it was serious, (employer) would pay the benefits. He said he was never told that when JM took over the payroll that RB would no longer be a supervisor.

The claimant also introduced a handwritten statement from JI, which read in part: "That day [i.e, the date of the accident] and every day we were given orders from [BA] and [RB] regardless of who was paying us."

BA testified that he was employed by (employer), a wholly owned subsidiary of (employer), as the site manager for all the projects at the air base. He said that JM was hired by (employer) to furnish labor and was also employed by (employer) as a welder. He considered JM a subcontractor of (employer). He said that when JM was at the site, he was to provide detailed directions to his employees, including the claimant. He was adamant that he did not tell the claimant to do the tar scraping job on (date of injury), and that the "chain of command" was through JM if the claimant was not doing the job right. He admitted that at the changeover meeting, he told the employees that JM did not have workers' compensation and that when the employees worked for Manpower, (employer) employees gave orders because Manpower did not have a field representative. He said that JM gave him the hours worked by his employees. He then certified them and issued a check in the total amount due to JM. He recalled that JM said at the changeover meeting that he would do his best to take care of the employees if they were injured, but that he, BA, did not agree to accept any responsibility and that no one at the meeting asked about serious injuries.

In rebuttal, the claimant re-iterated that JM never gave him orders except on welding projects; that BA did the hiring and that BA told him to scrape the tar off the tank. He said RB checked his job performance from time to time and he was never told that RB was not a supervisor, nor did JM ever supervise him.

BA, who was present throughout the hearing, then replied that he never told the claimant to scrape off the tar. He said he did not have to authorize JM to take the claimant to a doctor, but recommended it. He admitted that the claimant was paid by "running his time" even though he was not working. He said that the tank that the claimant had been working on had been a problem "all the way," and that two days before the accident the claimant had been working for Manpower on this tank and that he never told the claimant what to do at the tank after the relationship with Manpower ended.

Based on this evidence, the hearing officer made certain findings of fact, now appealed by the claimant, that on (date of injury), the claimant had been an employee of JM for two or three days; that the claimant was using JM's grinder at the time of the accident; that he was on JM's payroll; that he took directions and orders from JM; and that the claimant had not been under the direction and control of (employer).[2] The hearing officer also found

[2]Other findings were also appealed which address further details that are generally included within the above

that the claimant's "actions, demeanor and movements throughout the contested case hearing failed to exhibit an overt indication that CLAIMANT was still suffering from the effects of a back injury, and the cut had healed long ago." In his appeal, the claimant asserts that the evidence supports his position and complains about certain evidence being excluded and the quality of assistance he received from the ombudsman.

Texas law has long recognized that under certain circumstances an employee of one employer may become the borrowed servant of another. The Appeals Panel, in an early decision, recognized that the 1989 Act did not abolish this borrowed servant doctrine. *See* Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991. Pursuant to this doctrine, it has been held that the entity with the right to control the performance of duties by the employee is the employer for workers' compensation purposes. Texas Workers' Compensation Commission Appeal No. 92287, decided August 14, 1992. The resolution of the question of the right of control is a factual determination, Texas Workers' Compensation Commission Appeal No. 92039, decided March 20, 1992, and can often be made from a review of the contractual provisions, if any, between the potential employers. Where there is no contract or agreement which addresses this subject, the right to control the work may be established by circumstantial evidence of the actual facts surrounding the employment. *See* Texas Workers' Compensation Commission Appeal No. 931102, decided January 13, 1994. Relevant facts to consider are who had the right to hire and fire; who paid the wages and collected various taxes; who furnished the tools used on the job and who controlled the details of the employment. No one of these factors, however, is necessarily controlling. *See* U.S. Fidelity and Guarantee Company v. Goodson, 568 S.W.2d 443 (Tex. Civ. App.-Texarkana 1978, writ ref'd n.r.e.). It has also been held that an employee seeking workers' compensation benefits has the burden of establishing an employer-employee relationship out of which the alleged compensable injury arose. *See* Texas Workers' Compensation Commission Appeal No. 92035, decided March 12, 1992.

In the case under appeal, there was no documentary evidence of the relationship between (employer) and JM or the relationship between JM and the claimant.[3] The claimant and BA, the site manager, gave contradictory accounts of who directed the details of the claimant's work. The hearing officer, as the fact finder, is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. He was charged with the responsibility for resolving these conflicts in the evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, he could believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for

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findings and need not be addressed separately here.

[3]The hearing officer in his decision and order states that the parties stipulated: "On 0(date of injury) CLAIMANT was employed by EMPLOYER, who had a workers' compensation insurance policy with CARRIER which covered CLAIMANT." We consider this a misstatement of no significance because it is contrary to basic rationale of the decision. Also the alleged employer was a self-insured and there was no carrier in this case.

the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The testimony of BA, if found credible, was sufficient evidence to support the findings of fact and conclusions of law that JM, not BA, exercised control over the claimant and was his employer at the time of the accident and injury. We do not substitute our judgement for that of the hearing officer, where, as here, the findings and conclusions are supported by sufficient evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do note, however, that the hearing officer made a finding of fact that at the time of the injury, the claimant was using a tool furnished by JM. The only evidence on this point is the testimony of the claimant that the grinder did not belong to JM and that the other tools he used belonged to (employer). BA said he did not know who owned the grinder. We therefore disapprove this finding as not supported by any evidence, but conclude that the question of the tool ownership was only one factor in this case. The mistaken finding that JM owned the grinder was not in itself determinative of the ultimate issue of right of control and does not constitute prejudicial error.

The hearing officer found, and the parties did not appeal, that the claimant suffered a non-compensable injury in the course and scope of his employment. Therefore, we need not address this issue on appeal. We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16).

Finally, the claimant expressed dissatisfaction with an evidentiary ruling and with the assistance he received from the ombudsman. On the evidentiary matter, the hearing officer excluded as irrelevant a statement from a coworker which purported to address the matter of who exercised control over the claimant on (date of injury). However, the statement by its terms indicated that the signing witness did not work for (employer) after February of 1993, which was well before the date of injury. We find no error in this ruling. The claimant asserted at the hearing and on appeal that this statement was mistaken and that the author of the statement was working on the date of the alleged injury. While this may have been true, it was the responsibility of the claimant to make sure his evidence accurately reflected what he thought it said. Since on its face the statement was irrelevant, it was properly excluded. The claimant also complains that the ombudsman was somehow at fault for choosing not to introduce evidence from the base contracting officer on JM's status, presumably, under federal acquisition law. Section 409.041 provides that an ombudsman assists unrepresented claimants in obtaining benefits under the 1989 Act. They do not represent the claimant, nor do they take responsibility for the presentation of the claimant's case. The decision to present or not present evidence, in whatever form, is the responsibility of the claimant. It is not assumed by the ombudsman. Thus we find no merit in the claimant's assertion that an omission by the ombudsman constituted reversible error. *See* Texas Workers' Compensation Commission Appeal No. 931006, December 17, 1993.

Finding sufficient evidence to support the decision and order of the hearing officer, we affirm.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge