APPEAL NO. 94401

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 10, 1994. He (hearing officer) determined that the Texas Workers' Compensation Commission (Commission) had jurisdiction to decide the issues in the case, that respondent (claimant) was a covered employee under the employer's workers' compensation policy with the appellant (carrier) at the time of a compensable injury on (date of injury), and that the claimant had disability from August 5, 1993, to September 17, 1993. The carrier appeals urging that the hearing officer's conclusions of law are against the great weight and preponderance of the credible evidence in the record. Claimant asks that the decision be affirmed.

DECISION

We affirm.

The facts of the case are not largely in dispute on the issue of coverage. The claimant, not a U.S. citizen, had worked for the employer, a small family business, as a roustabout for several years and was apparently considered one of the "more valued" employees. Because of this, according to the employer, on January 6, 1992, the claimant was elected, in a special meeting of the board of directors, as Treasurer of the company for a one-year term from "January 1, 1992 to January 1, 1993." (The employer stated that the claimant was an officer of the company in early 1993 although there were no minutes or other corporate records showing this.) Holding a position as an officer was apparently required to have the claimant covered under a medical and disability policy for the company officers. In any event, others who performed roustabout duties were also officers of the company and a couple spoke Spanish. The claimant, who had limited formal education and limited English language skills, was present at the meeting of the officers held later in the day on January 6, 1992, and signed the minutes of the meeting. These minutes provided for the acceptance of the new officers showing claimant as the Treasurer and stating as business transacted:

> To accept the newly amended policies concerning workmans compensation for officers of the corporation. ie All officers of the corporation are to be excluded from workers compensation insurance and are to be insured by a separate (Carrier 1).

The claimant also signed a notice dated "4-29-92," which was printed both in English and Spanish, that stated the employer no longer has workers' compensation insurance after (date of injury).(effective date of termination not filled in).

The claimant testified he did not remember being told about the change in the insurance coverage, and that he did not know he was a treasurer. He did sign the paper but did not understand it and signed things that he was asked to sign. He claimed that although other officers spoke Spanish, he couldn't always understand because they

spoke different dialects. The employer testified that the claimant could communicate somewhat in English and that the whole matter was explained to him in Spanish by other Spanish speaking officers who were roustabouts. The claimant testified, and there is no evidence to the contrary, that he did not know how to perform duties as a treasurer and that he never performed any duties as a treasurer and only worked as a roustabout for the employer.

A copy of the workers' compensation policy between the carrier and employer with an effective date of "01/18/93" was in evidence and specifically, by position and by name, excludes the company officers from coverage, including the position and name of the claimant. Also in evidence was a medical coverage and disability policy issued by (Carrier 2) which covered all active officers of the company.

The claimant testified that he injured his shoulder and upper back area in a lifting incident on (date of injury). He told his employer about the incident and both apparently thought it was just a muscle strain and the claimant continued to work until late June when he went to M for personal reasons. He returned after some 30 days and on July 26th indicated that his shoulder was still bothering him and that he wanted to go to the doctor. This was arranged by his employer and he was taken off work by a doctor on August 5, 1993, and subsequently returned to work by his doctor on September 17, 1993, after treatment and therapy. Another doctor found that he reached maximum medical improvement on September 17, 1993, with a zero percent impairment rating. The claimant later saw another doctor who opined that surgery was indicated. In any event, the claimant and/or employer filed for medical expenses and disability coverage under the (Carrier 2) policy. The employer paid the deductible portion of the medical and the insurance carrier (Carrier 2) paid the remaining medical expenses. However, disability payments were denied under the policy because of a policy provision that required medical treatment be sought or rendered within 30 days of the injury. The claimant had not sought medical treatment for the (date of injury) date of injury until July 26, 1993. Because of this, the employer voluntarily paid the claimant income benefits, apparently equal to or greater than those provided under workers' compensation coverage, until mid-November 1993 when they were advised that the claimant had been returned to work status.

The claimant apparently contacted the Commission sometime in September 1993 to inquire about any benefits to which he might be entitled under workers' compensation and subsequently filed a claim which was disputed by the carrier (Carrier 2) on grounds including lack of coverage under the policy. The hearing officer determined that the Commission had jurisdiction to decide the issues in the case. We do not find merit to the carrier's assertion that the Commission lacks jurisdiction in this case, at least as to the issue of whether there was any coverage under the 1989 Act under the circumstances of

this case. We rejected an assertion of no jurisdiction to decide whether an employee had elected not to be covered by the 1989 Act in the unpublished Texas Workers' Compensation Commission Appeal No. 93196, decided April 29, 1993. We also find the evidence sufficient to support the hearing officer's findings and conclusions regarding the fact of and duration of claimant's disability.

The hearing officer found that the claimant was named treasurer for the sole purpose of excluding him, as an officer, from the workers' compensation policy and including him on the group health and disability policy and that the claimant never performed nor was paid for any duty as a treasurer. He concluded that the claimant was serving in a "dual capacity" and was therefor a covered employee under the workers' compensation policy issued by the carrier. Under the "dual capacity" doctrine as applied in Harris v. Casualty Reciprocal Exchange, 632 S.W.2d 714 (Tex. 1982), a corporate officer who was also performing the duties of an employee, was held to be covered by the employer's workers' compensation policy when injured while performing such employee duties under the dual capacity doctrine. The Supreme Court determined that the provision of the workers' compensation statute in effect at that time, which provided that a corporate officer could be covered under a subscriber's workers' compensation policy if specifically included in the policy, did not preclude coverage under the dual capacity doctrine. The claimant was performing as an employee at the time and came within the definition of an employee but had not been specifically included as a corporate officer in the workers' compensation policy. The provision of the former statute (TEX. REV. CIV. STAT. ANN. art. 8309 § 1a) is not found in the 1989 Act; however, we find no basis to conclude that the teachings of the court in Harris, *supra*, have no further application.

In the case before us, the claimant was clearly hired in October 1990 as a roustabout and fit squarely within the definition of employee found in the 1989 Act (Section 401.012). In his position as a roustabout he was covered by the employer's workers' compensation policy, the employer quite apparently not choosing to opt out of coverage under the 1989 Act. Until sometime in 1992, the claimant's circumstances remained unchanged as a roustabout covered under the employer's policy. It is unclear from the evidence when any attempted change in claimant's coverage, i.e. from workers' compensation to a separate health and disability policy, was to be effective. However, the claimant was elected as Treasurer on January 6, 1992, for a one-year period and he signed minutes acknowledging such election and a change in insurance coverage, although he states that he did not remember or understand the proceedings. There was also the document dated in April 1992 which was not filled out but which indicated that workers' compensation coverage was being terminated. It was clear from the evidence that the claimant was to continue performing his roustabout duties and that he was not capable of or qualified to serve as a corporate treasurer.

Of concern to us, aside from the lack of any evidence of action by the corporation to extend or renew the claimant's position as treasurer past January 1, 1993, is the effect of Section 406.035 under these circumstances. That section provides that "[e]xcept as provided by this subtitle, an agreement by an employee to waive the employee's right to compensation is void." It appears to us that the claimant, still serving, at least in a dual capacity, as an employee/roustabout, was potentially waiving workers' compensation coverage even though he was still serving in an employee capacity.

We do not find any specific provision of the 1989 Act which excludes (or includes for that matter) officers of a corporation from being eligible for workers' compensation benefits as long as they meet the definition of an employee. Nor do we find any provision of the 1989 Act which overrules or changes the holding of Harris, *supra. See also* Pennsylvania National Mutual Casualty Company v. Hannah, 701 S.W.2d 67 (Tex. App.-Beaumont 1985, writ ref'd n.r.e.). As the court noted in Harris, the dual capacity doctrine was recognized as early as 1921 in Miller Mutual Casualty Co. v. Hoover, 235 S.W. 863 (Tex. Comm'n App. 1921, judgm't adopted). The statute in effect at that time specifically excluded officers as employees. The claimant, Hoover, while an officer, also performed employee duties and was allowed recovery of benefits for an injury occurring in such employee capacity. In Harris, the claimant performed both as an officer and employee, was injured in his employee capacity and was allowed recovery even though he had not been included in a specific endorsement as provided for in the statute.

In both of these cases, the underlying principle seems to apply to the case at hand, that is, that exclusion from workers' compensation coverage by official position applies when performing in that official capacity but does not apply when performing as an employee. The court in Miller so interpreted the statutory language, which it did not consider clear, in limiting the exclusion. We believe the 1989 Act, read from all four corners, together with the case law, provides that an employee, functioning in a dual capacity, is not excluded from coverage just because of having an official title. We believe the carrier's policy with the employer in this case can and should be read in harmony with the 1989 Act and case law. (The policy provides that terms that conflict with the workers' compensation law in the policy are changed to conform to the law.) The claimant, in his capacity as treasurer, as stated in that policy by the specific position, would not be covered under workers' compensation if injured in that capacity. However, as an employee and when performing employee duties, he would fall within the coverage under the employer's workers' compensation policy covering employees performing roustabout duties.

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

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge