APPEAL NO. 950043
FILED FEBRUARY 22, 1995

On November 9, 1994, a contested case hearing was held. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the hearing were: (1) whether (JCon) was the employer of the respondent (claimant) for purposes of the 1989 Act; (2) whether the claimant sustained a compensable injury in the course and scope of his employment on _____; and (3) whether the claimant has had disability resulting from the injury sustained on _____, and if so, for what periods. The appellant (carrier) disagrees with the hearing officer's decision that on _____, JCon was the claimant's employer for purposes of the 1989 Act; that the claimant sustained a compensable injury in the course and scope of his employment on _____; and that the claimant has had disability from March 19, 1994, to the date of the hearing as a result of the injury of _____. The carrier requests that we reverse the hearing officer's decision and render a decision that the claimant did not suffer a compensable injury and that he does not qualify for coverage under the workers' compensation insurance policy covering employees of JCon. The claimant requests affirmance.

DECISION

Affirmed.

The parties stipulated that on or about _____, JCon carried workers' compensation insurance with the carrier. The claimant testified that he works as a plumber's helper for (RPlum), which is owned by his father. He further testified that RPlum has worked as a plumbing subcontractor for JCon for three or four years and that in December 1993 RPlum subcontracted with JCon to do plumbing work on between 13 and 17 houses at (Fort X). While he said that the houses were about 1,000 square feet in size, he also said they had three or four bedrooms and two bathrooms. He said the houses worked on were once duplexes. He testified that the agreement for the Fort X job provided that JCon would deduct money from RPlum payments for workers' compensation coverage and that JCon did deduct amounts for workers' compensation coverage. He said the agreement to deduct amounts for workers' compensation coverage was made because workers' compensation coverage was required for the Fort X job, which is a governmental installation. He further testified that his father supervised his work and that RPlum used their tools and materials on the Fort X job. He also said that while RPlum was performing the Fort X job, his father would work on other jobs, but that he and his coworker always worked on the Fort X job.

The claimant further testified that he injured his back removing a bathtub while working on the Fort X job on _____, and that he has been treated by (Dr. R) for his injury. He said Dr. R recommended that he not return to work and he also said that he

has been unable to work since his accident on _____ because of back pain. An MRI scan of the claimant's lumbar spine done on April 16, 1994, revealed degenerative disc disease, a disc herniation at the L4-5 level, and a prominent left sided ventral extradural defect at the L5-S1 level. Dr. R recommended physical therapy and pain medication and stated in May 1994 that the claimant would be off work for six months. The claimant underwent a trigger point injection on May 3, 1994, and in June 1994 (Dr. V), to whom the claimant was referred by Dr. R, recommended a lumbar discectomy. The carrier requested a second opinion from Dr. H who reported that he believed that the claimant is a candidate for surgical treatment.

The claimant further testified that at some point while receiving medical treatment a health care provider told him that the carrier was refusing coverage so he called the owner of JCon, Mr. F, who told him that he would contact the carrier. He said that after contacting the carrier, Mr. F told him that the carrier said the right paperwork had not been filed to provide the claimant with coverage, and that Mr. F then told him that "we did some paperwork. You can go back." However, the claimant testified that the carrier continued to refuse coverage for his injury.

A "Construction Subcontract" between JCon, contractor, and RPlum, subcontractor, dated December 28, 1993, provided that RPlum would renovate bathrooms in 10 buildings in a specified family housing area at Fort X for a specified sum and that the parties agreed "[t]o furnish certificate of workman's compensation as required by law . . . ." Paragraph 8a of the contract provides as follows:

> If sub-contractor does not provide Worker's Compensation Insurance Binder to [JCon], he accept [sic] that [JCon] deduct from payment the insurance cost as required by Law.

On a TWCC-83 form, JCon, as the hiring contractor, and RPlum, as the independent contractor, entered into an "Agreement to Establish Employer-Employee Relationship For Certain Building and Construction Workers'," on May 11, 1994. The term of the agreement is from March 2, 1994, to March 2, 1995, and the location of each affected job site is "blanket." The agreement provides that JCon will withhold the cost of workers' compensation insurance coverage from RPlum's contract price and that JCon will purchase workers' compensation insurance coverage for RPlum and RPlum's employees. The agreement also provides that once the agreement is signed, JCon will be the employer of RPlum and RPlum's employees for the purpose of providing workers' compensation insurance coverage, and that the agreement makes JCon the employer of RPlum and RPlum's employees only for the purpose of workers' compensation laws of Texas and for no other purpose.

Also in evidence were a number of invoices from RPlum to JCon for work done at Fort X. Some of the invoices precede the date of the subcontractor agreement of

December 28, 1993, and some of them are dated after the date of that agreement. All of the invoices are for work done prior to May 11, 1994, the date the TWCC-83 was signed. Most of the invoices which predate the December 28, 1993, subcontractor agreement, and most of the invoices which are subsequent to that agreement provided for a deduction for workers' compensation insurance. The claimant testified that a secretary at RPlum would complete an invoice and send it to JCon where a secretary would make a notation on the invoice of the amount to be deducted for workers' compensation insurance, the deduction would be made, and then RPlum would pick up its check.

The carrier contends that the hearing officer erred in determining that the claimant was injured in the course and scope of his employment on _____, and in determining that the claimant has had disability from March 19, 1994, to the date of the hearing as a result of his injury of _____. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). Generally, in workers' compensation cases the issues of injury and disability may be established by the testimony of the claimant alone. Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App. - Texarkana 1974, writ ref'd n.r.e.). We are satisfied that sufficient evidence supports the hearing officer's determinations on the issues of injury and disability and that those determinations are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The carrier also contends that the hearing officer erred in finding that JCon was the general contractor and RPlum was the subcontractor, and in finding that on December 28, 1993, JCon and RPlum entered into an agreement where JCon agreed to deduct payments from RPlum's payments to pay for workers' compensation insurance. These findings are supported by the testimony of the claimant and by the subcontractor agreement of December 28, 1993, and they are not against the great weight and preponderance of the evidence.

The carrier further contends that the hearing officer erred in making the following finding of fact and conclusion of law:

FINDING OF FACT

5. [JCon] was the employer under Section 606.123(e) [sic] of the [1989 Act].

CONCLUSIONS OF LAW

2. On _____, [JCon] was the Claimant's employer for purposes of the [1989 Act].

It is apparent from the hearing officer's discussion of the evidence that the reference to Section 606.123(e) in Finding of Fact No. 5 is a typographical error and that he intended to cite Section 406.123(e) in that finding as he did in his discussion.

Section 406.123, which appears in Subchapter F (Coverage of Certain Independent Contractors) of Chapter 406 of the Texas Labor Code, provides in pertinent part that a general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor; that if a general contractor elects to provide coverage the actual premiums, based on payroll, that are paid or incurred by the general contractor for the coverage may be deducted from the contract price or other amount owed to the subcontractor by the general contractor; that an agreement made under this section makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of this state; that a general contractor shall file a copy of an agreement entered into under this section with the general contractor's workers' compensation insurance carrier not later than the 10th day after the date on which the contract is executed; that a general contractor who enters into an agreement with a subcontractor under this section commits a violation if the contractor fails to file a copy of the agreement with the carrier; and that the violation is a Class B administrative violation.

Section 406.142, which appears in Subchapter G (Coverage of Certain Building and Construction Workers) of Chapter 406, provides as follows:

This subchapter applies only to contractors and workers preparing to construct, constructing, altering, repairing, extending, or demolishing:

(1) a residential structure;

(2) a commercial structure that does not exceed three stories in height or 20,000 square feet in area; or

(3) an appurtenance to a structure described by Subdivision (1) or (2).

Section 406.144, which is in Subchapter G, provides in pertinent part that, except as provided by this section, a hiring contractor is not responsible for providing workers' compensation insurance coverage for an independent contractor or the independent contractor's employee, helper, or subcontractor; that an independent contractor and a hiring contractor may enter into a written agreement under which the independent contractor agrees that the hiring contractor may withhold the cost of workers' compensation insurance coverage from the contract price and that, for the purpose of providing workers' compensation insurance coverage, the hiring contractor is the employer of the independent

contractor and the independent contractor's employees; that an agreement under this section shall be filed with the Commission and is considered filed on receipt by the Commission; that the hiring contractor shall send a copy of an agreement under this section to the hiring contractor's workers' compensation insurance carrier on filing of the agreement with the Commission; and that an agreement under this section makes the hiring contractor the employer of the independent contractor and the independent contractor's employees only for the purposes of the workers' compensation laws of this state.

While we agree with the carrier's contention that the provisions of Subchapter G of Chapter 406 are applicable to this case in that RPlum was working on residential structures (*See* Tex. W.C Comm'n, 28 TEX. ADMIN. CODE § 112.200 (Rule 112.200) for the definition of "residential structures" for purposes of Section 406.142 [formerly Article 8308.3.06(a)]), we cannot conclude that the hearing officer's reliance on Section 406.123(e) of Subchapter F constitutes reversible error inasmuch as Section 406.144(e) of Subchapter G contains a similar provision. Rule 112.201 implements the provisions of Section 406.144 and the carrier points out that that rule provides, in part, that an agreement made under subsection (b) of the rule shall be made on a form TWCC-83; that the workers' compensation insurance coverage provided by the hiring contractor under the agreement shall take effect no sooner than the date on which the agreement was executed; and that deductions for the premiums shall not be made for coverage provided prior to that date. The carrier contends that since the TWCC-83 in evidence was dated after the date of the alleged injury the claimant was an employee of RPlum and did not qualify for coverage under the workers' compensation insurance policy covering employees of JCon.

Although the evidence reflects that the TWCC-83 which is required under Rule 112.201 was not executed until after the claimant was injured, under the particular facts of this case we decline to hold that as a matter of law the claimant was not covered under JCon's policy of workers' compensation insurance with the carrier. The uncontroverted evidence is that JCon and RPlum entered into the "Construction Subcontract" on December 28, 1993, and in that contract JCon and RPlum agreed that if RPlum did not provide a workers' compensation insurance binder to JCon, then JCon would deduct from RPlum's payments "the insurance cost required by law," and JCon did in fact withhold the cost of workers' compensation insurance from payments due RPlum. Although the carrier questions the credibility of the invoices, it was for the hearing officer to determine the weight and credibility to be given to the evidence. The hearing officer could find, as he apparently did, that the contract of December 28, 1993, which was executed prior to the date the claimant was injured, was an agreement to provide workers' compensation insurance coverage to RPlum and to the employees of RPlum, and that the contract to provide workers' compensation coverage was carried out by the withholding of the cost of workers' compensation insurance. To hold as a matter of law that the claimant was not covered by JCon's workers' compensation insurance notwithstanding the subcontractor

agreement and the withholding of the cost of workers' compensation insurance coverage because a TWCC-83 was not timely executed would be elevating form over substance, which we have declined to do in the past. For example, in Texas Workers' Compensation Commission Appeal No. 92384, decided September 14, 1993, we held that a doctor had certified in a letter that the claimant had reached maximum medical improvement (MMI) notwithstanding that the certification was not on the Commission prescribed TWCC-69 form. However, we remanded the case to the hearing officer because the doctor had not effectively assigned an impairment rating. In doing so we stated:

> We emphasize with this ruling that we are not attempting to elevate form over substance so as to thwart, rather than implement, the dispute resolution process. The fact that a certification of MMI or a finding of impairment is not on the Commission's form does not, in and of itself, go to its substance as an expert opinion.

The 1989 Act provides that 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). The fact finder may draw reasonable inferences and deductions from the evidence adduced. Employers Mutual Liability Insurance Company v. Strother, 358 S.W.2d 753 (Tex. Civ. App. - Waco 1962, writ ref'd n.r.e.). As previously noted, from the evidence adduced the hearing officer could find that the December 28, 1993, contract was an election to provide workers' compensation coverage, and Section 406.144(e) provides that "[a]n agreement under this section makes the hiring contractor the employer of the independent contractor and the independent contractor's employees only for the purposes of the workers' compensation laws of this state." We conclude that the hearing officer's finding and conclusion that on _____, JCon was the claimant's employer for purposes of the 1989 Act is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Although we conclude that the hearing officer's finding and conclusion are not contrary to the overwhelming weight of the evidence under the particular circumstances presented in this case, we caution as we have before that parties that do not follow the rules of the Commission in making agreements run the risk that the trier of fact will not give effect to an agreement. *See* Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992.

The carrier also contends that the claimant did not qualify for coverage under the workers' compensation policy covering employees of JCon because the TWCC-83 was not filed with the Commission or the carrier until sometime after May 11, 1994, which was when it was executed. The carrier does not mention untimely filing of the construction subcontract as an election to provide workers' compensation coverage and no evidence was adduced on that matter at the hearing; however, we note that the benefit review conference (BRC) report of July 7, 1994, notes that the construction subcontract was before the Commission at the BRC. In Texas Workers' Compensation Commission

Appeal No. 92528, decided November 23, 1992, the hiring contractor and subcontractor entered into a TWCC-83 Agreement to Establish Employer-Employee Relationship for Certain Building and Construction Workers the day before the claimant, who worked for the subcontractor, was injured. The carrier argued that the TWCC-83 in that case was not effective because there was no evidence that the claimant complied with the requirement that the agreement be filed with the Commission and sent to the insurer of the hiring contractor pursuant to Article 8308-3.06 [see now Sections 408.144(c) and (d)]. We noted that Article 8308-3.06(d) [now Section 406.144] provided that the agreement shall be filed with the Commission by personal delivery or registered or certified mail, and that the hiring contractor shall send a copy of the agreement to the insurer of the hiring contractor when the agreement is filed with the Commission. We observed that "[n]o time limit for filing nor any provision stating the consequence of not filing the agreement are stated in the statute," and that "[r]ules which implement this provision, [Rule 112.201] stipulate only that the agreement must be filed with the Commission and provided to the hiring contractor's workers' compensation insurance carrier within 10 days of the date of execution." We then noted that the agreement was first brought before the Commission at the BRC, which was more that 10 after its execution, and noted that provisions which do not go to the "essence of the act to be performed," but which are for the purpose of promoting the proper, orderly, and prompt conduct of business, are not ordinarily regarded as mandatory. We then stated:

> This case involves a statute with a filing requirement indefinite in terms of time, amplified by rules providing for filing within a 10-day period. We cannot see how these requirements go to the "essence of the act to be performed," which is a voluntary agreement between the parties involved in certain construction projects to provide for workers' compensation coverage. Had the legislature, or the Commission in adopting its rule, intended to state a consequence of not timely filing such agreements, they could have done so. In this regard, we observe that the TWCC-83 "Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers'" contains the statement that "This declaration takes effect upon receipt by the Texas Workers' Compensation Commission." No such caveat applies to the "Agreement to Establish Employer-Employee Relationship for Certain Building and Construction Workers."

We then affirmed the hearing officer's decision that the hiring contractor was the claimant's employer for purposes of workers' compensation insurance despite the untimely filing of the TWCC-83. In this case, the subcontractor agreement of December 28, 1993, was executed before the claimant was injured, but it appears that it may not have been brought before the Commission until the BRC. However, considering our holding in Appeal No. 92528, *supra*, we cannot conclude that as a matter of law the failure to timely file the agreement with the Commission and carrier disqualifies the claimant from coverage under JCon's workers' compensation insurance policy.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge