APPEAL NO. 950589
FILED MAY 17, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on December 1, 1994, by (hearing officer), to consider whether the appellant (claimant) was an employee of the respondent (self-insured), whether the claimed injury arose out of voluntary participation in a program thus relieving the self-insured of liability for compensation, and whether the claimant has disability as a result of an injury sustained on _____, and if so, for what periods. After closing the record on March 14, 1995, the hearing officer determined the disputed issues adversely to the claimant. Claimant does not appeal the findings of fact but does state her disagreement with the dispositive conclusions of law that she was a volunteer for the self-insured, that she was not employed by the self-insured when she suffered her accident, and that did she did not have disability as a result of the injury she sustained while a volunteer for the self-insured. The response filed by the self-insured asserts the correctness of the hearing officer's determinations.

DECISION

Affirmed.

The documentary evidence, together with the testimony of claimant, the sole witness, indicated that on _____, while functioning as a foster grandparent (FG) in the Foster Grandparent Program (FGP) at the Volunteer Station in (City), claimant, then age 69, slipped on a puddle of water and fell. Claimant's accident was not disputed. She testified that she was helped up by the director and a janitor and was taken home, that she could not pay for a doctor, and that her attorney arranged for her to be treated by Dr. N whom she saw on April 22, 1994. According to Dr. N's records, claimant was diagnosed with a lumbosacral sprain and provided with therapy. Claimant said she was released by Dr. N to return to work in October 1994 (Dr. N's record stated October 3, 1994) and that from April to October she did not receive her compensation as an FG which, she said, consisted of two checks each month, one for $98.00 and the other for $113.00. The amounts of the checks in evidence, drawn by the City, varied somewhat from the amounts testified to by claimant and showed that she received certain amounts during the time she was off work. Claimant testified that after her husband died she was told about the FGP and decided to volunteer. FGP time sheets indicated claimant worked as an FG four hours a day during the school weeks. She said that upon arriving at the school the director would assign her to be with children with exceptional needs, three to four years of age. Typical comments on FGP Monthly Volunteer Time Sheets described claimant's activities as being a role model, encouraging the children to participate in classroom activities and games and to interact with other children, and with helping build their self esteem.

Claimant's position at the hearing was that she was an employee of the self-insured who received wages and therefore was entitled to workers' compensation coverage under

the 1989 Act. The position of the self-insured was that claimant was a volunteer in a federally funded program and was not a covered employee under the 1989 Act. At the outset of our analysis we note that claimant, who had the burden to show that she was a covered employee under the 1989 Act, did not articulate the identity and nature of the self-insured. The parties' stipulation that "Region was a self insured entity as those terms are described in the [1989 Act]" did not indicate whether the self-insured was a governmental entity and, if so, whether it was a federal, state, county or municipal entity or some combination thereof. Chapter 504 of the 1989 Act addresses workers' compensation insurance coverage for employees of political subdivisions and Sections 504.001(2) and (3) define political subdivision to include counties and municipalities and define employee to mean "(A) a person in the service of a political subdivision who has been employed as provided by law; or (B) a person for whom optional coverage is provided under Section 504.012 or 504.013 [here inapplicable]." Section 504.012 (a) provides, in part, that "[a] political subdivision may cover volunteer firefighters, police officers, emergency medical personnel and other volunteers that are specifically named."

The self-insured introduced excerpts from the Federal Register, Vol. 48, No. 113, dated June 10, 1983, which published the revision of 45 CFR Part 1208 regarding the FGP. The revision stated, in part, that the FGP is authorized under Title II, Part B of the Domestic Volunteer Service Act of 1973, as amended (Pub. L. No. 93-113); that the program's dual purpose is "to provide opportunities for low-income persons aged 60 or over to provide supportive person-to-person service in health, education, welfare or related settings to help alleviate the physical, mental, or emotional problems of children having exceptional or special needs;" that the "sponsor" is a public agency or private nonprofit organization which is responsible for the operation of the FGP; that "volunteer station" means a public agency, private nonprofit organization or proprietary health care agency or organization that accepts the responsibility for assignment and supervision of FGs . . . ;" that "stipend" is a payment to FGs to enable them to serve without cost to themselves; and that "[FGs] are volunteers, not employees, of the sponsor [Emphasis supplied];" and that FGs will be provided with minimum levels of accident and personal liability insurance.

In evidence was a Memorandum of Understanding (MOU) signed on August 30, 1988, between the City as the Sponsoring Agency (SA) and the self-insured as the Volunteer Station (VS). According to its terms the VS required 25 FGs to work 20 hours per week with exceptional needs children. Among other things, the MOU provided that the SA was to recruit, interview, select and enroll volunteers in the project; provide them with orientation and training; refer them to the VS for placement; retain full responsibility for the management and fiscal control of the project; and reimburse the volunteers in the amounts of their actual round-trip transportation expenses for travel between their homes and the VS. The MOU further provided that while the Senior Citizen Program Specialist, "who is an employee of the [SA]," shall provide supervision to the volunteers at their place of work at least twice per quarter, the VS was to designate an FG supervisor for the VS site "who is an employee of the [VS]" and the FG supervisor is responsible for the day-to-day supervision of the volunteers. Claimant did not argue that she had become a borrowed

servant of either the City or the VS.

There was also in evidence a letter dated July 15, 1994, on the letterhead of "Region (counties 1 and 2), which stated that claimant was not an employee of "Region ESC" and that a Notice of Refused/Disputed claim (TWCC-21) was filed with the Texas Workers' Compensation Commission on May 24, 1994, disputing her claim. The TWCC-21 stated that claimant was not an employee of the self-insured and that her "medical will be paid through various federal programs." Also in evidence were accident proof of loss forms, dated September 2 and November 1, 1994, which described claimant's accident. These forms indicated they were for the Older Americans Volunteer Programs and had the box "FGP" checked. The forms also certified that claimant was a member of the group insured by the named private carrier and that the "grantee" was "[FGP]- [City]." Claimant's pre-service orientation and training record of August 23, 1991, indicated that the FGP benefits included stipends, meals, transportation, accident insurance, physical examination, recognition and days off.

The self-insured also introduced the decision of an Ohio federal district court[1] which determined that the State of Ohio's policy of deeming federal FG volunteers employees under the Ohio worker's compensation scheme was in conflict with and preempted by federal law. The court noted that the language of 42 U.S.C. § 5011, *et seq*. and its legislative history was "replete with the term 'volunteer' as distinguished from one who is part of the workforce;" that 42 U.S.C. § 5011(d) speaks of providing volunteers with allowances or stipends; that 42 U.S.C. § 5044(a) states that the Director is to assure that the services of volunteers are limited to activities which would not otherwise be performed by employed workers; and that 42 U.S.C. § 5058 was amended in 1984 to add the words "workers' compensation" to specify that volunteer stipends may not be treated as wages for purposes of workers' compensation.

The self-insured also introduced an August 21, 1986, letter from the Office of the Attorney General for the State of Oklahoma commenting on the 1984 amendment to 42 U.S.C. § 5058 and opining that "[t]t would appear that federal law has, without question, preempted state law with regard to this issue."

The hearing officer found, among other things, that at the time of her accident claimant was a volunteer with the self-insured and not an employee, that the self-insured was thus relieved of liability for compensation, and that claimant did not have disability resulting from a compensable injury. We are satisfied that the dispositive factual findings and legal conclusions of the hearing officer find sufficient support in the evidence. Claimant cited no legal authorities below, though offered time after the hearing to file a brief, nor does she offer any such authorities in her appeal.

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[1] United States of America v. Raymond A. Connors, *et. al*, Case C-2-83-896, In the United States District Court for the Southern District of Ohio, Eastern Division

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge