

APPEAL NO. 990687

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 16, 1999, a contested case hearing (CCH) was held. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable (back) injury on \_\_\_\_\_ (all dates are 1998 unless otherwise stated), that claimant had disability from March 31st through the date of the CCH and that (Company RD) was the claimant's employer for purposes of the Texas Workers' Compensation Act.

Appellant (carrier) appealed, citing evidence which would indicate that claimant had not sustained a work-related injury and, consequently, did not have disability and that claimant, at the time of his injury, was an employee of (Company RP), an employer that did not have workers' compensation coverage. Carrier contends that the functions of Company RD and Company RP "are separate and distinct" and that the hearing officer's reliance on certain Appeals Panel decisions was "misplaced." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not indicate a response from claimant.

DECISION

Affirmed in part and reversed and rendered in part.

On the issues of injury and disability, claimant testified that on \_\_\_\_\_ he "punched in" to work at 7:30 a.m. and that at about 10:45 or 11:00 a.m., Mr. JR, the employer's vice president and apparently Company RP's chief operations officer, told claimant that he was to accompany the head driver, Mr. WJ, to deliver some doors at a city some distance from Dallas. Claimant said that although he "was a little under the weather," he proceeded as directed. Claimant testified that at some point between stops, Mr. WJ told him "to get in the back and hold the doors," which were described to be large, red oak, double doors. Claimant testified that as the truck began moving, "the driver side wheel . . . just drop [sic] down real quick," and the double doors hit claimant across the back and knocked him to the floorboard of the truck. Claimant testified that he "hollered" and told Mr. WJ about the accident and injury and that he reported it to Mr. JR the next morning. Mr. WJ's version is considerably different, being that he picked claimant up at 3:00 a.m. and they proceeded to the distant city to deliver the doors; that claimant looked ill and was complaining and "moaning so bad" that he asked claimant if he wanted to stay home, but claimant said no. Mr. WJ says that claimant stayed in the cab the whole trip, except to give directions to Mr. WJ, as he was backing the truck to unload it. Time card records indicate claimant worked 18 hours on \_\_\_\_\_. Mr. JR denied claimant ever reported an injury to him. Medical histories have some slightly different versions of the way the accident occurred.

Claimant testified that he went to the hospital emergency room (ER) the next day, March 12th. The ER record has a history of "3 oak wood doors fell on pt." and complaints of "right sided chest pain." Claimant testified that he complained of back pain but the ER

records have no mention of back complaints. Chest x-rays and a CT scan showed a mass in claimant's lung, which was "presumed pneumonia"—but that the doctor could not "totally exclude tumor." Another diagnostic test suggested "alveolar cell carcinoma." Claimant was urged to see his private physician. Claimant testified that he attempted to see a doctor recommended by the employer (rather, by Mr. RR, Mr. JR's father, who was a consultant who had hired claimant) but, for one reason or another, was unable to assure the doctor that there was insurance coverage. Claimant continued working his regular duties, including overtime, during this period. Claimant retained an attorney, who referred him to Dr. H. Claimant saw Dr. H on March 31st and Dr. H diagnosed ruptured lumbar disc and lumbar disc dysfunction, cervical thoracic and lumbar strain and right shoulder pain. Dr. H took claimant off work on March 31st. In evidence is a report, dated May 20th, from Dr. N, who diagnosed cervical, thoracic lumbar sprain/strain and facet mechanical pain. (How claimant got to Dr. N is not clear.) At some point in time, Dr. H stopped seeing claimant, apparently because carrier had denied liability, and claimant changed attorneys. Claimant's new attorney referred claimant to Dr. A, who, in a report dated June 16th, noted pain in the lower, middle and upper back. Dr. A's diagnosis was "injury to lumbar nerve root," "thoracic segmental dysfunction" and "lumbar myofascitis." An MRI performed on June 19th showed "a 2 mm posterior disc bulge" at L5-S1 with no other abnormality.

As should be evident, the evidence is in conflict. In these situations, we have frequently cited Section 410.165, which provides that the hearing officer is the sole judge of the weight and credibility to be given to the evidence. It is for the hearing officer to resolve conflicts and inconsistencies and to determine the facts in the case. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The testimony of claimant alone can establish that an injury and disability occurred. See Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989); Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993; Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. It is apparent that the hearing officer found the claimant's testimony credible regarding the circumstances of his injury holding the doors in the back of the truck and rejected testimony to the contrary. The trier of fact may believe all, part or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Because another fact finder may have drawn different inferences from the same evidence does not, in and of itself, support a reversal. Salazar, et al. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). We affirm the hearing officer's decision on the injury and disability issues as being supported by claimant's testimony.

The circumstances around who is the proper employer are a bit more problematic. In order to understand the case, it is necessary to identify the players and background. Originally, a company by the name of Royal Door and Sash was operated by the Rowland family, father, Mr. RR, an older son, Mr. JAR, and a younger son, Mr. JR. This company was eventually incorporated as Company RP in 1991 or 1992 to sell, manufacture, deliver and install doors and sashes. In 1994, Company RD was incorporated to take over the

sales aspect of selling products nationally to multifamily developers. Company RP, although having personnel in its name, is not a leasing company in any way and is the company that manufactures and delivers the doors. Mr. JAR is the president of both Company RP and RD and Mr. JR is the vice president of both companies. Mr. RR is a consultant to both companies, apparently in a semi-retired capacity. Mr. JR is the chief operations officer of Company RP, which has anywhere from 50 to 70 employees engaged in the manufacturing and delivering of doors in parts of Texas. The testimony was that Company RD has 12 to 14 sales people throughout the country and subcontracts the manufacture of doors to several other companies nationwide in addition to Company RP, while Company RP works only for Company RD. Company RD has workers' compensation coverage for Mr. JAR and Mr. JR and "maybe some salesmen as well." Company RP does not carry workers' compensation and, when claimant was hired, he signed a "[Company RP] Corporation Employee Injury Benefit Plan Participant Election Agreement" which states that Company RP does not have workers' compensation insurance coverage. Claimant was hired by Mr. RR and shortly thereafter was provided with a cap, shirt and windbreaker-type jacket bearing the name of Company RD. Mr. JR's testimony was that the truck Mr. WJ and claimant were using on \_\_\_\_\_ was owned or leased by Company RD. Mr. JR explained that Company RD "had better credit than [Company RP]" when they bought that particular truck. Both Mr. JAR and Mr. JR testified that the caps, t-shirts and jackets with the Company RD name were given to employees, customers and others as advertisement and that the caps, on occasion, would have other associated businesses (for example, a lock company) on the back. Both Mr. JAR and Mr. JR testified that Company RP builds, delivers and installs doors that Company RD has sold or taken orders for. It is undisputed that both Company RD and Company RP had offices in essentially the same building ("it's two buildings with a hole cut through it . . . [f]or walking back and forth.").

The hearing officer cites Section 406.124, which states:

Sec. 406.124. CAUSE OF ACTION. If a person who has workers' compensation insurance coverage subcontracts all or part of the work to be performed by the person to a subcontractor with the intent to avoid liability as an employer under this subtitle, an employee of the subcontractor who sustains a compensable injury in the course and scope of the employment shall be treated as an employee of the person for purposes of workers' compensation and shall have a separate right of action against the subcontractor. The right of action against the subcontractor does not affect the employee's right to compensation under this subtitle. (V.A.C.S. Art. 8308-3.05(h).)

The hearing officer makes clear that she regards Company RD as the "person" who has workers' compensation insurance and subcontracts all, or part, of the work to Company RP "with the intent to avoid liability as an employer." The hearing officer cites Texas Workers' Compensation Commission Appeal No. 962108, decided December 2, 1996, for the proposition that intent to avoid liability can be shown by circumstantial evidence, in that seldom will a party admit "they intended to avoid liability as an employer." The hearing officer also cites as evidence of the intertwining of entities that the cap, shirt and jacket

worn by claimant had the Company RD name and/or logo and that the vehicle claimant was using was leased by, and had the name of, Company RD on the door. The hearing officer commented in her discussion:

Accordingly from all the circumstances and reasonable inferences I have found that [Company RD] sub-contracts all or part of it's [sic] deliveries to sub-contractor, [Company RP], with the intent to avoid liability as an Employer. While not admitted to, it is clear that [Company RP] not providing workers' compensation insurance on any of its purported employees would definitely provide an economic reason for its formation. Furthermore, although [Company RD] and [Company RP] may be "legal" entities, each maintaining separate payroll accounts, I have found from all of the circumstances that they are so closely entwined that they are effectively one entity in overall manner of operation with the same offices for both companies. Appeal Panel Decision 982047 [Texas Workers' Compensation Commission Appeal No. 982047, decided September 28, 1998].

While another fact finder could certainly have reached a different conclusion, which would have also been affirmable, on the same evidence, we cannot say that the hearing officer's decision on this point is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer also commented that Mr. JR was an officer (vice president of both Company RD and Company RP) and that it was undisputed that Mr. JR told claimant (and Mr. WJ) to go to the other city to deliver the doors in question; that was "sufficient evidence that [Company RD] had the right to control the progress, details and methods of operation of the Claimant, so the Claimant became a borrowed servant of [Company RD]." Apparently, the hearing officer believed that when Mr. JR was directing claimant, he was doing so as an officer of Company RD rather than in his function as vice president and top manager of Company RP (Mr. JR testified that there was no one above him at Company RP). The hearing officer further made the following conclusions of law:

### **CONCLUSIONS OF LAW**

3. [Company RD] was the Claimant's Employer for the purpose of the Texas Workers' Compensation Act at the time of the \_\_\_\_\_, injury.
4. On \_\_\_\_\_, Claimant sustained a compensable injury while acting as a borrowed servant of Employer, [Company RD], and while furthering its business, and while acting in the course and scope of employment as a borrowed servant.

We find those determinations to be inconsistent and contrary to each other. Either claimant is to be treated as an employee of Company RD pursuant to Section 406.124 or he is a borrowed servant of the general employer, in this case, Company RD. In order to be a borrowed servant, an employee must first be the employee of some employer, usually

referred to as the general employer. Texas Workers' Compensation Commission Appeal No. 980620, decided May 13, 1998. In this case, claimant was acting under the direction and control of Mr. WJ delivering doors. There is no evidence that claimant was a borrowed servant of Company RD or performed any functions whatsoever for Company RD. Accordingly, we reverse the hearing officer's findings and determinations that claimant was a borrowed servant of Company RD as being unsupported by the evidence.

We affirm the hearing officer's decision on the issues of injury and disability and that Section 406.124 is applicable whereby Company RD subcontracted out work to Company RP with intent to avoid liability as an employer. We reverse the decision that claimant was a borrowed servant of Company RD as being so against the great weight and preponderance of the evidence as to be clearly wrong and render a new decision that claimant was not a borrowed servant. Carrier is liable to pay benefits to claimant under provisions of Section 406.124.

---

Thomas A. Knapp  
Appeals Judge

CONCUR:

---

Stark O. Sanders, Jr.  
Chief Appeals Judge

---

Gary L. Kilgore  
Appeals Judge