

APPEAL NO. 991660

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 13, 1999. He (hearing officer) determined that the respondent (claimant) sustained a compensable right knee injury on \_\_\_\_\_, and had disability and that the claimant was an employee of (Employer). The appellant (carrier) appeals these determinations, contending that they are contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

Employer., was owned by ME. It typically bid on concrete construction jobs and then hired subcontractors to do the work. Most often it used (Subcontractor), a partnership owned by ME and his brother, JE, as its subcontractor. Employer., carried workers' compensation coverage for its owner, ME, its office manager, LG, and for allegedly its only other employee, JV, its "job superintendent."<sup>1</sup> Subcontractor was not a worker's compensation insurance subscriber.

The claimant testified that he was hired by Employer., through HP, his son-in-law. The claimant said that HP took him to the work site and kept track of his hours and that he actually worked digging trenches and setting forms for the concrete as part of a school construction project. He further testified that he was present when HP telephoned ME to see if the claimant could work the job and that HP told him ME approved his hire. He said that HP took the claimant to the offices of Employer., before the workday started, but no one was at the office because the workday for the office had not yet started. He said that he never discussed his wages with ME or the length of the job, nor did he ever fill out any paperwork in connection with his hire. He stated that JV was at the job site and told him what to do. The claimant also testified that he was not authorized to work in the United States, but that he did have a social security number. On \_\_\_\_\_, he said, he slipped and suffered a right knee injury while working at the job site.

JV testified that HP brought the claimant to the job site on November 16, 1998, and told him that the claimant was his father-in-law and would be working there. JV further said he asked HP who had hired the claimant and HP told him that he had already talked to ME and was told to "bring him on." JV said he believed HP and responded, "Ok, fine." JV said he had no hire/fire authority and believed the claimant was an employee of Subcontractor. After the injury, according to JV, ME told him that he had nothing to do with hiring the claimant. He also said he directed the claimant's work at the job site and that HP in the past had brought "undocumented aliens" to work.

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<sup>1</sup>JV was not related to the claimant.

JE testified that only ME had hire/fire authority at Employer.

LG testified that her duties include preparing the payroll for both Subcontractor and Employer., based on time sheets turned in each Wednesday. She said that prior to the injury, she had never heard of the claimant and that he had never come to the office. She testified that she received no time cards for the claimant on Wednesday, November 18, 1998, and that, when JV called to report the accident, she told EM, who then asked who the claimant was. She also said that no paperwork exists to show that the claimant is an employee of Employer. She conceded that (Company), has in the past employed "undocumented aliens" and that when this is done they do not fill out paperwork, but time sheets are turned in for them.

ME testified that he is the only one with hire/fire authority for Employer. He said he never gave JV authority to hire anyone and that all hires must go through him, ME. He said he never spoke with the claimant before the injury and denies any telephone conversation with HP authorizing the claimant's hire. He admitted that he sent a payroll check to the claimant after the injury, using an Subcontractor account, because "time" was turned in for the claimant. Even though he did not consider the claimant an employee of either Employer., or Subcontractor, he paid him because he felt sorry for him in his injured condition and because he was HP's father-in-law. He also, apparently for the same reason, wrote a letter on November 23, 1998, to a health care provider guaranteeing that (Company) would pay for treatment for the claimant, provided the treatment was approved in advance. Also in evidence were two checks written to the claimant to pay for medication. These were drawn on a Employer., account. He could offer no explanation for why both accounts were used. He also testified that the claimant "probably" did the work for which he was ultimately paid.

No evidence from HP was provided.

The parties stipulated at the CCH that if the claimant were an employee, he was an employee of Employer., for workers' compensation purposes. The carrier also did not dispute that a work-related injury occurred and stipulated a period of disability if a compensable injury were found. The determinative issue thus became whether the claimant was an employee.<sup>2</sup> Section 401.012(a) defines employee as "each person in the service of another under a contract of hire, whether express or implied, or oral or written." The hearing officer determined that the claimant was an employee of Employer., at the time of the injury. The finding of fact that directly supports this is: "[HP] telephoned [ME] in the presence of the Claimant and made arrangements for the Claimant to work as a laborer for Mr. E." Finding of Fact No 12. Both at the CCH and on appeal, the carrier asserted that the claimant "never worked under a contract of hire" with Employer., or with Subcontractor, and thus did not meet the definition of employee under the 1989 Act. In support of its

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<sup>2</sup>Finding of Fact No. 20, "[f]or purposes of workers' compensation insurance (Company) and Mr. E are one entity," has not been appealed. See Texas Workers' Compensation Commission Appeal No. 93161, decided April 16, 1993.

position, it asserts that the claimant's testimony about what transpired between HP and ME was "incoherent and vague" and that ME's testimony to the contrary was "credible." Consistent with this position, it contends that the claimant was in fact a "gratuitous servant" over the three days he worked before the injury. This is also consistent with ME's testimony that he paid the claimant for work he "probably did" because he "felt sorry" for him.

The carrier cites several cases which we believe are distinguishable from this case because the claimants in those cases did volunteer work with the hope of gaining a position in the future, or before various preconditions to employment had been met, or when a contract for employment would take effect in the future. None of these circumstances pertain to the case we now consider. While it is true that the claimant had the burden of proving his status as an employee, whether he was an employee or not was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93931, decided November 23, 1993; Texas Workers' Compensation Commission Appeal No. 93443, decided July 19, 1993. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. He obviously found the claimant credible in his assertion that HP spoke with ME and told him, the claimant, that ME approved his hiring. This is consistent with JV's recounting of his conversation with HP about the claimant's status. In finding the claimant's testimony credible, the hearing officer did not find ME credible in his assertions that no such conversation took place, that he did not authorize the hiring of the claimant, and that he only paid the claimant for his work as a good deed and a favor to HP. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer. Rather, we find his determination that the claimant was an employee of Employer, sufficiently supported by the evidence deemed credible and persuasive.

The carrier also asserts in its appeal "that the hearing officer's decision appears to be based on extraneous factors related to his distaste for the employer's business practices at the time of the injury in question as opposed to proper legal considerations concerning whether there was a contract for hire." We note that much evidence about "the employer's business practices" was introduced at the CCH in connection with the background facts about the hiring practices of the Employer. The carrier did not object to this evidence. The hearing officer made certain findings of fact arguably irrelevant to the disputed issue, which the carrier characterizes in its appeal as leaving an "incorrect impression" or which were true at the time of the CCH, but not now. Based on our review of the record, we are unwilling to conclude that the decision and order of the hearing officer was based on improper considerations or personal feelings about the employer's hiring practices.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Judy L. Stephens  
Appeals Judge