

APPEAL NO. 991847

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 22, 1999. With respect to the single issue before him, the hearing officer determined that (APF) was the employer of (decedent) for purposes of the Texas Workers' Compensation Act at the time of his injury and death on _____. In its appeal, (carrier 1), the workers' compensation carrier for APF, states that it "disagrees with the Hearing Officer's statement of the disputed issue" and contends that the "proper issue before the Hearing Officer should have been which carrier was required to pay workers' compensation benefits, not whether [APF] or [Services (EPS)] was the Deceased's Employer at the time of the claimed injury." In its response to carrier 1's appeal, the (carrier 2) urges affirmance and maintains that carrier 1 waived its right to argue that the issue was improperly worded "because it failed to object to the statement of the disputed issue within the time frame set forth in the Texas Labor Code and the Texas Workers' Compensation Rules." (claimant beneficiary), the minor child of the decedent, did not respond to the appeal.

DECISION

Affirmed.

Carrier 1 attaches several exhibits to its appeal that were not presented at the hearing. Generally, we will not consider evidence not submitted into the record but raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92225, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to the party's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). It is not necessary to remand this case for consideration of the attached exhibits because they do not concern the issue of right of control and, thus, are neither relevant to nor would they produce a different result.

Carrier 1 asserts that the issue was improperly worded. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) deals with responses to benefit review conference (BRC) reports and the requirements for adding additional issues. Carrier 1 did not comply with the requirements of Rule 142.7 in requesting that the issue before the hearing officer be modified. Thus, we find no merit in the assertion that the hearing officer erred in deciding the issue that was presented to him as unresolved from the BRC.

The hearing officer's decision contains a detailed factual summary which is adopted for purposes of this decision. Carrier 1 does not challenge the hearing officer's Finding of Fact No. 3, which states that "[APF] had the right to control the details and manner of the work of [decedent] at the time of his injury and death on _____." In addition, a review of

the record demonstrates that Finding of Fact No. 3 is supported by sufficient evidence, specifically, the testimony of Ms. R, the vice president of EPS, and Mr. S, APF's plant manager. Ms. R testified that EPS hired and paid the decedent and assigned him to work at APF. She stated that EPS did not supervise the decedent or exercise control over his daily work activities. In addition, Ms. R testified that the decedent's hours were verified by an APF supervisor and that, thereafter, EPS would cut a pay check for the decedent. Mr. S testified that he determined the decedent's daily job assignments. Mr. S stated that he trained the decedent, that he established his work hours, that APF provided the equipment and tools that the decedent used in performing his work duties, and that EPS did not have anyone on site to supervise or direct the decedent's activities. With the evidence of the right of control being essentially uncontroverted, the hearing officer properly determined that APF had the right of control over the details and manner of the work of the decedent at the time of his injury and death, that the decedent was the borrowed servant of APF at that time, and that APF was an employer of the decedent for purposes of the 1989 Act. Gibson v. Grocers Supply Co., Inc., 866 S.W.2d 757 (Tex. App.-Houston [14th Dist.] 1993, no writ); see also Brown v. Aztec Rig Equipment, Inc., 921 S.W.2d 835 (Tex. App.-Houston [14th Dist.] 1996, writ denied).

Generally, in cases such as this one, the Texas Workers' Compensation Commission determines which carrier is liable for workers' compensation benefits by determining which employer exercised the right of control over the decedent at the time of his compensable death. To the extent that a dispute remains between carrier 1 and carrier 2 as to who is liable for workers' compensation death benefits in this instance, that issue is best determined in another forum because we have resolved the issue that is properly before us.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge