

## APPEAL NO. 992882

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 7, 1999. He (hearing officer) determined that the appellant (claimant) was injured on \_\_\_\_\_; that for workers' compensation purposes, the claimant was an independent contractor and not an employee of (company) at the time he was injured; that he did not sustain a compensable injury; that since he was not an employee, he did not have an average weekly wage; and that because the claimant did not sustain a compensable injury, he did not have disability. The claimant appealed, urged that the great weight of the evidence showed that he was an employee of the company at the time he was injured, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor on all issues. In the alternative, the claimant requested that the case be remanded to the hearing officer and that he be permitted to submit additional evidence. The respondent (carrier) replied, urged that the hearing officer properly applied the provisions of Subchapter G of the 1989 Act to the facts, contended that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

### DECISION

We affirm.

The Decision and Order contains a thorough statement of the evidence. Only a brief summary of the evidence will be included in this decision. The company is in the business of selling large canopies that go over retail gasoline pumps to protect customers from rain. It contracts with others to erect the canopies. The claimant was injured on \_\_\_\_\_, when he was performing his first installation job for the company. He testified that the company supplied the material and a forklift; that he provided the labor, hand tools, and scaffolding; that he is an independent contractor; that the canopy was about 115 feet by 36 feet; that he was told he would need three other people to work for him; that he was to be paid about \$6,000.00 to construct the canopy; and that he paid the three people working for him just like the company paid him. He said that he was told by Mr. D, the construction manager for the company, that 10% would be deducted from the contract price for general liability and workers' compensation insurance, that the company would provide workers' compensation insurance, and 10% would be retained for basic warranty on the work. He said that he did not complete an Agreement to Establish Employer-Employee Relationship for Certain Building and Construction Workers (TWCC-83), that he did not sign a document stating that he would provide his own workers' compensation insurance, and that he paid the company for workers' compensation insurance.

Mr. D testified that he talked with the claimant about the job; that there is no written agreement with the claimant concerning the job; that there was no agreement that the claimant could work only on the company's job; that there was no written agreement concerning workers' compensation insurance; that workers' compensation insurance was

not required for the job; that he did not tell the claimant how many people to hire; that he did not know what a TWCC-83 is; and that the canopy is a commercial, free-standing structure that is less than three stories tall.

In a letter dated November 16, 1999, Mr. E said that he was present on May 17, 1999, when the claimant and Mr. D spoke; that Mr. D advised the claimant that the claimant needed to have workers' compensation insurance coverage to work for the employer and asked if he had it; that the claimant said he did not and he could not afford it at the time; that Mr. D said it was not a problem; that Mr. D said that the company would furnish workers' compensation insurance for 10% of each job; that the claimant agreed; and that Mr. D gave the claimant some forms and said he would call him as soon as he had a job for him.

Both the claimant and the carrier introduced a copy of a form used by the company that Mr. D referred to as an information sheet. The form contains: "INSURANCE GENERAL LIABILITY \_\_\_\_\_ W/C\_\_\_\_\_." The form introduced by the claimant does not have anything entered in the underlined spaces. The copy introduced by the carrier has "No" in those spaces. The "No" in those spaces does not appear to be in the same handwriting as is the remainder of the handwritten entries on the form. The claimant testified that he did not write "No" in either space on the form. Mr. D testified that "No" was in both spaces when he received the form.

Chapter 406 of the 1989 Act is entitled Workers' Compensation Insurance Coverage. Subchapter G of Chapter 406 is entitled Coverage of Certain Building and Construction Workers. Section 406.141 provides:

DEFINITIONS. In this subchapter:

- (1) "Hiring Contractor" means a general contractor or subcontractor who, in the course of regular business, subcontracts all or part of the work to be performed to other persons.
- (2) "Independent contractor" means a person who contracts to perform work or provide a service for the benefit of another and who:
  - (A) is paid by the job and not by the hour or some other time-measured basis;
  - (B) is free to hire as many helpers as desired and may determine the pay of each helper; and
  - (C) is free to, while under contract to the hiring contractor, work for other contractors or is free to send helpers to work for other contractors.

Section 406.142 states:

APPLICATION. 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 406.143(a) says:

Unless the independent contractor and hiring contractor enter into an agreement under Section 406.144, the independent contractor is responsible for any workers' compensation coverage provided to an employee of the independent contractor, and the independent contractor's employees are not entitled to workers' compensation insurance coverage from the hiring contractor.

Section 406.144 provides in part:

- (a) 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. 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.
- (c) An agreement under this section shall be filed with the commission [Texas Workers' Compensation Commission] either by personal delivery or by registered or certified mail and is considered filed on receipt by the commission.

- (e) An agreement under this section makes the hiring contractor the employer of the independent contractor and the independent contractor's employees only for purposes of the workers' compensation laws of this state.

The Commission adopted TWCC-83 for a hiring contractor and an independent contractor to use to enter into a written agreement that the independent contractor is or is not an employee of the hiring contractor. The claimant did not attempt to establish that a written agreement stating that he was an employee of the company had been entered into. Instead he relied on oral representations by Mr. D and on the theory that the company exercised the right of control over him.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. The hearing officer made factual determinations that resulted in the conclusion that the coverage provisions of Subchapter G of Chapter 406 applied to the contract between the claimant and the company. Those factual determinations of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). The hearing officer also determined that the claimant and the company did not enter into a written agreement that would make the claimant an employee of the company for the purpose of workers' compensation laws of the state, that such an agreement was not filed with the Commission, and that the claimant was not an employee of the company for purposes of workers' compensation laws of the state. Those determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust.

The claimant cited Texas Workers' Compensation Commission Appeal No. 950043, decided February 22, 1995. In that case, the Appeals Panel affirmed a determination that a written agreement between the claimant and the hiring contractor that the hiring contractor would provide workers' compensation insurance for the claimant that was not on a TWCC-83 was sufficient. The Appeals Panel said that it would not elevate form over substance. In the case before us, there is no written agreement.

The Appeals Panel has limited jurisdiction and does not have jurisdiction to render a decision concerning enforcement of the provisions of any contract between the claimant and the company and a possible administrative violation by the company.

We affirm the decision and order of the hearing officer.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Dorian E. Ramirez  
Appeals Judge