

APPEAL NO. 992938

On October 28, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether respondent, (claimant), sustained an injury in the course and scope of his employment; (2) whether (Employer 1) was claimant's employer for purposes of the 1989 Act; (3) whether claimant has had disability; (4) whether respondent, Carrier 1, is relieved of liability under Section 409.002 because of claimant's failure to timely notify his employer under Section 409.001; (5) whether Carrier 1 is liable for claimant's injury sustained on _____; (6) whether appellant, Carrier 2, provided workers' compensation insurance coverage (Employer 2a) on _____; (7) whether Carrier 2 provided workers' compensation insurance coverage for W.C., (Employer 2b) on _____; (8) whether (Employer 2b) was claimant's employer for purposes of the 1989 Act; and (9) whether (Employer 2a) was claimant's employer for purposes of the 1989 Act. The hearing officer decided that: (1) claimant sustained an injury in the course and scope of his employment on _____; (2) (Employer 2b) was claimant's employer for purposes of the 1989 Act on the date of injury; (3) (Employer 1) was not claimant's employer for purposes of the 1989 Act; (4) claimant had disability from day _____, and continuing through the date of the CCH; (5) claimant timely notified his employer under Section 409.001; (6) Carrier 1 is not liable for claimant's injury sustained on _____; (7) Carrier 2 provided workers' compensation insurance coverage for both (Employer 2b) and (Employer 2a) on _____; (8) (Employer 2b) and (Employer 2a) are one and the same company; and (9) Carrier 2 is liable for benefits. Carrier 2 contends that the hearing officer's findings that claimant was the employee of (Employer 2b), that Carrier 2 provided workers' compensation coverage for (Employer 2b), that claimant sustained an injury in the course and scope of his employment, that claimant has had disability, and that Carrier 2 is liable for benefits are contrary to the overwhelming weight of the evidence. Carrier 1 requests affirmance of the hearing officer's decision. Carrier 1 contentions that Carrier 2 lacks standing to appeal and that Carrier 2 did not appeal findings of fact and conclusions of law in Docket No. _____ are without merit. Claimant requests affirmance.

DECISION

Affirmed.

GW stated in an affidavit that he is a managing partner of (Employer 2a) and (Employer 2b), which provide temporary employees; that (Employer 2a) and (Employer 2b) were formed as separate companies; that (Employer 2a) provides temporary workers that are covered by workers' compensation; that (Employer 2b) provides temporary workers that are not covered by workers' compensation; that (Employer 2a) carries workers' compensation with Carrier 2; that (Employer 2b) carries nonsubscriber coverage through another insurance company; that (Employer 2b) has never paid any workers' compensation premiums to Carrier 2; that (Employer 1) is a client that requires temporary workers for whom workers' compensation is not provided; and that (Employer 2b) gave claimant the

opportunity to work for (Employer 1). EL, (Employer 1)'s vice president, testified that, until the benefit review conference, he was under the impression that (Employer 2ab) provided workers' compensation coverage.

Claimant testified that in August 1998 he was hired by (Employer 2ab) and was immediately assigned to work at (Employer 1). He said that on _____, he felt a pop in his lower back while lifting an ATM machine onto a grinding table at (Employer 1). Grinding the machine was part of his job. Claimant said that he reported his injury to (Employer 2ab) within a few days of the injury and that as a result of his low back pain from his injury, he has not worked after _____. Claimant said that (Employer 1) supervised his work and provided his tools. Claimant went to Dr. R, D.C., in January 1999 and Dr. R noted the history of a back injury on _____ at (Employer 1) and provided several diagnoses regarding claimant's lower back pain. Dr. R noted that a lumbar MRI revealed degenerative disc disease with bulging at several levels. Dr. R noted on February 24, 1999, that claimant was unable to work and may be restricted from full duty for six to 10 weeks. Dr. S saw claimant in March and June 1999 and he diagnosed claimant as having a _____, work-related low back injury. Dr. S also noted that claimant would not likely be able to perform heavy-duty work and would benefit from physical therapy.

BE testified that she is the director of human resources for (Employer 2a), that (Employer 2a) and (Employer 2b) are separate companies registered with the Texas Secretary of State, that (Employer 2a) carries workers' compensation with Carrier 2, that (Employer 2b) does not carry workers' compensation but does have an ERISA plan, that claimant was an employee of (Employer 2b), and that (Employer 2a) and (Employer 2b) have the same owners and share the same office locations. BE also testified that (Employer 2b) supervised claimant and that claimant reported his back injury to (Employer 2b) on _____-1999.

Claimant's August 19, 1998, signed application for employment with (Employer 2ab) states that (Employer 2ab) is not a subscriber to Texas workers' compensation and does not have workers' compensation insurance and that the applicant agrees that any recovery for an on-the-job injury will be limited to (Employer 2ab)'s on-the-job injury program. In an injury benefit plan enrollment form signed by claimant on December 11, 1998, it is stated that he acknowledges that (Employer 2b) is a nonsubscriber to workers' compensation. However, in evidence is a workers' compensation policy with an issue date of September 18, 1998, that names Carrier 2 as the carrier and (Employer 2b) and (Employer 2a) as insureds, and which provides a policy period of September 15, 1998, to September 15, 1999. Endorsement 001 of the policy names Carrier 2 as the carrier and (Employer 2b) as the insured, states "Endorsement Effective 09/15/98," and states "Policy Effective Date 09/15/98." Endorsement 002 of the policy names Carrier 2 as the carrier and (Employer 2a) as the insured, states "Endorsement Effective 01/15/99," and states "Policy Effective Date 09/15/98." The alternate employer endorsement page of the policy names Carrier 2 as the carrier and (Employer 2ab) as the insured. The amendatory endorsement page of the policy provides that Carrier 2 will provide 60 days advance notice to (Employer 2ab) in

the event of cancellation or material change to the policy. See also the notice provisions in Section 406.008 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 110.1.

On September 23, 1998, Carrier 2 provided written notice to the Texas Workers' Compensation Commission (Commission) of a new policy in which Carrier 2 is the carrier, (Employer 2b) is the insured, and the policy period is September 15, 1998, to September 15, 1999. On February 5, 1999, after claimant's injury, Carrier 2 provided written notice to the Commission of a correction/revision/endorsement to the policy that it had previously provided notice of and stated that (Employer 2a) is the insured and gave the same policy period as before.

The hearing officer found that on _____, claimant sustained a back injury while in the course and scope of his employment at his assigned work site at (Employer 1); that on _____, claimant was the employee of (Employer 2b); that on the date of injury workers' compensation coverage was in effect for (Employer 2b) under Carrier 2's workers' compensation insurance policy; that on January 4, 1999, claimant reported to (Employer 2ab) that he injured his back working at (Employer 1); and that due to the claimed injury, claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage from day after injury date, through the date of the CCH. The hearing officer concluded that claimant sustained an injury in the course and scope of his employment on _____; that (Employer 2b) was the claimant's employer for purposes of the 1989 Act; that (Employer 1) was not the claimant's employer for purposes of the 1989 Act; that claimant had disability from day after injury date, through the date of the CCH; that claimant timely notified his employer of his injury; that Carrier 1 is not liable for claimant's injury of _____; that Carrier 2 provided workers' compensation insurance coverage to both (Employer 2b) and (Employer 2a) on _____; and that Carrier 2 is liable for benefits.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the finder of fact. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). While the hearing officer found that (Employer 2b) and (Employer 2a) are so closely entwined that they are effectively one entity in overall manner of operation and concluded that they are the same company, such finding and conclusion are not necessary in light of the hearing officer's other findings and conclusions, which we have found to be supported by sufficient evidence. We find no merit in Carrier 2's contention that the hearing officer erred in refusing its request to add issues

because the parties themselves reformulated the issues at the CCH and such reformulation was accepted by the hearing officer.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge