APPEAL NO. 000057

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 December 8, 1999. The issues concerned the identity of the employer of the appellant, (Mr F), who is the claimant. The issue was phrased as: "[contractor] the claimant's employer for the purposes of the Texas Workers' Compensation Act?"

The hearing officer found that the contractor was not the employer of the claimant for purposes of the workers' compensation act.

The claimant has appealed through his attorney; he argues that the hearing officer erred in not applying statutes or rules in his decision. He argues that Section 406.142 and related rules were not applicable in this case. He further argues that a Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers (TWCC-83) form had not been filed by the employer with the Texas Workers' Compensation Commission (Commission) and was, therefore, not effective on the date of the injury. He alludes to a considerable off-the-record discussion that occurred between the hearing officer and the parties in which substantive matters were discussed. He states that the hearing officer reviewed a file presented by the contractor which the attorney for the claimant was not allowed to see. The claimant argues that the hearing officer allowed a violation of confidentiality when another insurance agent for the contractor was allowed into the CCH. He points out that the witness for the respondent (carrier) essentially knew no facts about the nature of the relationship between the contractor and the person who recruited the claimant to work. The carrier responds that the claimant's attorney did not complain of any inappropriate conduct after a recess was taken to contact the Commission's central office and that, in fact, no inappropriate behavior took place. The carrier also responds that the decision is supported by the record.

DECISION

Affirmed because the claimant failed to meet the burden of proof to show that, at the time of his injury, he was acting within the course and scope of business for the contractor.

The record in this case is extraordinarily sparse and it is possible to speculate that much information that may have been useful to the hearing officer in considering the relationships and liabilities in this case was left undeveloped by either party. We must, in our review, focus on that which <u>was</u> developed and the hearing officer's decision must be reviewed in that light.

This is a case involving a serious injury, a fall and resultant skull fracture, to the claimant. He was injured on a work site while building in a large apartment complex. He spoke little English. Medical records that were put into evidence indicate that he was 20 years old and a native of (country).

The claimant said that he lived in the same building as Mr. V, who asked him in July 1998 if he wanted to work for "the company" which he understood to be the contractor. He said that he and six other workers would be driven to and from the job site by Mr. V. The claimant said there were three primary jobs he performed at the work site: he would put up Sheetrock, lay floors, and "work on the roof." He said that Mr. V pointed out a supervisor on the premises and told him to follow whatever directions were issued by that supervisor. One of the tasks he recalled being told to do by this man was put up Sheetrock. He said the nail gun he used was supplied by Mr. V and he did not know if the contractor furnished it or not. He said that the contractor furnished heavy equipment onsite and an electrical generator. The claimant said that the apartment buildings were three stories high, but he could not say how many apartments were in a single building.

The claimant said that the contractor paid Mr. V, who, in turn, paid all the men he recruited in cash. The claimant said he recalled filling out a form for "Social Security." He said he understood that taxes were taken out of his pay. There were times when the identified supervisor would send him home because there was no work for him to do that day. He was initially paid about $7.00 an hour and was paid $9.00 an hour at the time of his accident.

The witness for the contractor and the carrier was Mr. L, the company comptroller. Mr. L had never visited the work site and knew nothing of the details of who supervised the workers, who provided tools, or exactly how payment was made. He would defer to his understanding of "standard operating procedure" in his testimony that Mr. V was likely paid by the foot for the work performed. He said the only paperwork completed by Mr. V, whom he identified as a "subcontractor" for the contractor, was a TWCC-83, which was filled out by every subcontractor. Mr. L testified that he, or another person, were responsible for sending these to the Commission. He offered to produce the certified mailing card for the TWCC-83 he contended was signed by Mr. V, but the claimant objected for failure to exchange. He estimated that 10 subcontractors had filled this out; the one produced that he alleged was that of Mr. V was simply signed with a first name and last initial. It is dated by the contractor on November 7, 1997, but not until July 15, 1998, by the person alleged to be Mr. V. It states that it is effective when filed with the Commission and it is further provided that this must be within 10 days of execution.

What Mr. L knew about the project on which the claimant had been working was that it involved building from 2 to 300 "units," each unit being a 1,000 square foot apartment. Mr. L estimated that the total size of the project would be between 200,000 and 300,000 square feet. He said that the general contractor was one of two companies he named and that there were other contractors out there along with the contractor.

Mr. L testified, significantly, that the only type of work performed by the contractor was wood framing. He said that the contractor did not do sheetrocking or roofing, except to build the supporting decking for the roof. He said that he understood that Mr. V would be free to subcontract with other companies as well. Because the contractor did not do roofing, Mr. L stated that the contractor would not supply roofing materials or tools. He said

that the general contractor would have supplied the framing materials that were used by the contractor.

Mr. L agreed that while Mr. V also signed an agreement to indemnify the contractor, the contractor nevertheless took out of his pay an amount each month to pay for liability insurance because Mr. V did not have workers' compensation. There is no documentation in the record of how this was accomplished or the amounts taken out. Although it was asserted that there was no written contract between Mr. V and the contractor, none of the checks to Mr. V, whose existence was alluded to, were produced nor was the indemnification agreement made a part of the record.

The claimant's medical records and his testimony indicate that on _____, he fell three stories from where he was working "on the roof," landing on his forehead. The precise task he was doing at the time was not developed. He said that he could not recall how he fell.

At the beginning of the CCH, the claimant objected to the presence in the CCH of the liability insurance agent for the contractor. The carrier said that there was no intent to call this person as a witness, that he would be there only as an observer. He was not represented to be there as a third-party litigant. The hearing officer allowed him to stay, saying that he could do so because confidentiality statutes did not preclude his presence and because of his "relationship" to the contractor/employer.

Near the end of the CCH, the hearing officer took a recess for the purpose of contacting the Commission headquarters to ascertain if the TWCC-83 in evidence had been filed with the Commission. Back on the record, the hearing officer announced that he was unable to contact the person who would supply the information. There was no contention by either party or reference to inappropriate conversations or development of the evidence during this recess.

The claimant put into evidence what is called an "affidavit" but is, in fact, an unsworn signed statement of Mr. V. It is dated July 19, 1999. Although the claimant argues on appeal that Mr. V speaks very little English himself (not developed one way or the other in the record), the statement is in English and several paragraphs long. It states that Mr. V worked as a supervisor "during 1997 and 1998 for about 11 months." It further states that he worked on two apartment projects for the contractor, one of which was the project in question. He asserts that the contractor does roofing and decking and he was told to "organize a crew," and he reported to a supervisor named "[Mr. J]" whose last name was unknown. He indicated that the names of individuals to work on each crew were reported to Mr. J daily, who might send some home if there was no work. All supplies were provided by the contractor.

Mr. V stated that the contractor would issue one check to him and he would split it amongst himself and the crew. He said a percentage of each check was held out for "insurance."

We must first state that we agree that the liability insurer for the contractor should not have been permitted to "observe" the CCH. He falls within none of the categories to whom disclosure of confidential claims information is permitted under Sections 402.084(b), 402.085, or 407.129. There is no exception that we can see for those who merely have business relationships with the employer that authorize them to be in attendance as nonwitnesses over objection from the claimant. However, any remedy for this is beyond the scope of the Appeals Panel and does not encompass reversal of the decision on the merits and evidence.

Second, the contentions made about events that transpired while a recess was called underscore the importance of keeping all proceedings on the record, even where time will be consumed as telephone contact is made with a witness. With no reference or objection having been made when the parties were back on the record, the Appeals Panel has nothing to review except the obviously divergent recollections of the parties. We will not, for the first time on appeal, consider whether conduct not objected to at the time occurred.

Notwithstanding the amount of time devoted at the CCH to the matter of the TWCC-83, this is not dispositive of the case here nor does it appear to be the underpinning of the hearing officer's decision. We will note that to the extent any evidence was developed about the apartment complex construction site, it was not established that the site was one covered by Section 406.142. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 112.200 (Rule 112.200) covers only multi-family "residences" that do not exceed quadraplexes and "commercial structures" that do not exceed three stories or 20,000 square feet. And, it was not established whether the agreement was in effect on the day of the claimant's injury. (The carrier has somewhat oversimplified the holding in Texas Workers' Compensation Commission Appeal No. 950043, decided February 22, 1995.)

However, the issues raised by this are not reached because the hearing officer's decision indicates he made his determination "irrespective" of the existence or filing of this form. The discussion states the hearing officer's belief that the claimant worked on other projects that ranged beyond the course and scope of the business of the contractor. In short, the claimant, who had the burden of proof of showing the existence of either an employment or borrowed servant relationship, did not satisfy the hearing officer with a link to the contractor and the work he was performing at the time of his injury. The claimant testified that he performed several different tasks. The specific "roofing" task he was doing at the time of his injury is not described. While the claimant's attorney argued at closing that it was incredible to believe Mr. L's assertion that the contractor's business was confined to framing, there was essentially nothing to rebut this other than Mr. V's statement that the contractor also performed "roofing." The hearing officer could reconcile these statements as supporting Mr. L's testimony that the contractor prepared the underlying framing support to the roof. Given the unclear evidence about the status or employment of "[Mr. J]," the purported onsite supervisor, we cannot say that the hearing officer erred by rejecting any alternative contention that the claimant was a borrowed servant. However unorthodox it may have been for the claimant to have been "recruited" to work for one (or

several) subcontractors with very little apparent formality, however understandable his lack of personal knowledge of all the details of the business relationships would be, this does not obviate the necessity of establishing the elements of the employment relationship and the liability of the contractor's insurer. (Neither we nor the hearing officer were asked to consider if there was any requested discovery that was denied or that a party refused to cooperate with same.)

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case here and affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge