APPEAL NO. 000216

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 6, 2000, a hearing was held. The hearing officer held the record open for a written argument, upon the request of one party, until January 10, 2000, and then determined that (site employer) was respondent's (claimant) employer for workers' compensation purposes at the time of his injury on June 16, 1999. Appellant (carrier 1--insuring site employer) asserts that Findings of Fact Nos. 9-12, 14, and 16-19 plus one conclusion of law are in error. Carrier 1's argument in the appeal is directed to what it says is the hearing officer's "faulty conclusion" and argues that the Texas Labor Code, chapter 92, the Texas Common Worker Employer's Act, should be construed to supercede the right-to-control test used to determine whether an employee is a borrowed servant. Respondent (carrier 2--insuring the hiring employer, Hiring Partners, Inc.) replied with specific references to the facts and applicable law and stated that the decision should be affirmed. The appeals file does not contain a reply from claimant.

DECISION

We affirm.

The only issue in this case concerned the identity of the employer. The record of hearing discloses no dispute that claimant was working at site employer's location on _____, when he fell from a roof, sustaining injury to his right ankle, pelvis, back, right arm, and head. The evidence indicates he fell approximately 30 feet onto concrete.

Claimant testified that in talking to a family friend, Mr. H, about his need for a job for the summer, Mr. H suggested that he see hiring employer. Claimant at the time was 17 years old, had just finished high school and testified further that he had never worked in construction before (he had worked in a doctor's office for a limited time).

Claimant applied to and was hired by hiring employer, which told him to report to site employer the next day. He did so and was put to work. Claimant said that he was instructed in what to do, where to do it, and how to do it by Mr. C, a supervisor working for site employer. When asked how he could tell whether Mr. C and others worked for site employer as opposed to hiring employer, claimant said that Mr. C and others wore shirts with patches that said "[site employer]," whereas he and "D" Mr. D, another temporary employee hired by hiring employer, just wore regular clothes.

Claimant said he used few tools but that the tools he used were provided by site employer. He said that at times Mr. C instructed him but other times Mr. C would discuss matters with Mr. D and then Mr. D would pass on Mr. C's thoughts to claimant. A day or two after Mr. D departed the site employer's location, claimant was told to work on the roof of the gymnasium under construction. He did so. An employee or employees wearing site employer patches told him to put insulation under sheet metal and showed him how to do it. While carrying some insulation which obstructed his sight, he fell off the roof at a point where scaffolding ended.

Claimant also testified that when hired he was instructed by hiring employer to report to site employer at 8:00 a.m. the next morning and was also told that if he had to miss work to call hiring employer; he did not miss work. But, he said, hiring employer did not tell him what he would be doing when working for site employer. Claimant said that hiring employer did give him the name of Mr. C as his supervisor, and, claimant added, Mr. C every morning would "start me out."

Ms. J testified on behalf of hiring employer. She said that a five-page proposal provided as carrier 1's exhibit 3 was incorporated into the contract between hiring employer and site employer. This proposal says nothing about right to control, but it does state that hiring employer is responsible for obtaining workers' compensation insurance. She said that hiring employer initially instructed claimant about safety, about reporting accidents to hiring employer, and about use of alcohol and drugs being prohibited. She said that one reason for hiring employer's visits to site employer, which probably were not daily, was to see if site employer had any problems with employees. She agreed that on the date of the accident, hiring employer had no one on the roof instructing claimant how to work. She also stated that hiring employer does not have a staff leasing license and is not a contruction contractor. In answer to the hearing officer, Ms. J said that hiring employer probably had from one to four employees with site employer at one time. All agreed that hiring employer had the right to hire and fire its employees. She said that she wrote a letter to site employer after the accident stating that claimant, as a general laborer, was not even supposed to be on the roof, implying that he was not qualified. Obviously, this letter could be interpreted as more evidence that hiring employer did not instruct claimant as to how to work on the roof.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He found that hiring employer was not versed in construction work and could not supervise day-to-day work, that hiring employer visited the site employer weekly, that the contract between hiring employer and site employer did not address right to control, and that claimant was hired by hiring employer and then sent to site employer. These findings are all supported by sufficient evidence; the evidence would also have supported a finding that hiring employer visited site employer approximately twice a week but there was no evidence that hiring employer visited the site daily. In addition, the hearing officer found that carrier 2 collected premiums and refused to pay this claimant but that this was not relevant to the determination of who is the employer for workers' compensation purposes. While we would agree that collection of premiums is not controlling as to who had the right to control, we do not agree that who collected premiums is never relevant; however, considering the record as a whole, we understand the hearing officer to have been commenting that collecting premiums is not controlling and there is no reversible error.

The hearing officer also found that under the borrowed servant doctrine the employer who has the right of control over day-to-day activities is the employer; this is not inaccurate but does not address any factual situation in this case. Another finding of fact said that Mr. C instructed claimant to work on the roof; this is sufficiently supported by the testimony of claimant, and Mr. C did not testify and did not offer any statement

contradicting this point; the evidence sufficiently supports this finding. Finally, the hearing officer found that site employer controlled the work out of which the accident arose and site employer directed the manner of claimant's work. These findings are sufficiently supported by claimant's testimony and the testimony of Ms. J which indicated that hiring employer did not direct such details and did not even know claimant was being used on the roof. In addition to claimant's testimony that he was shown how to place the insulation on the roof, the hearing officer could also give some weight to the uncontroverted evidence that claimant was 17 years old and had no experience, even as a laborer, in contruction; the hearing officer could infer that such an employee would require an amount of instruction greater than would be given to other general labor employees.

While carrier 1 argues on appeal that the Texas Common Worker Employer's Act should be interpreted to supercede the right-of-control test in determining the employer, we do not agree. *See* Texas Workers' Compensation Commission Appeal No. 962486, decided January 17, 1997. That Act does not address workers' compensation. While it does state at VTCA, Labor Code § 92.021 that a "license holder" is the employer of common workers, VTCA, Labor Code § 92.012(6) states that "this chapter does not apply to . . . a temporary common worker employer that does not operate a labor hall." (The section also addressed what must be physically provided in the labor hall.) Ms. J said nothing of a labor hall. Claimant said nothing of a labor hall. In addition, the purpose of this chapter is to protect the health, safety and welfare of workers and to establish standards of conduct; the chapter is entitled "Temporary Common Worker Employers."

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge