APPEAL NO. 000423

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 20, 2000, a hearing was held. The hearing officer determined that appellant (carrier) is not entitled to take credit for payments made to respondents (claimants) by (employer), as an advance against future workers' compensation benefits. Carrier asserts that a settlement reached on behalf of Employer, was a third party payment for which carrier can receive credit for future payments, pointing out that there were no exemplary damages paid; carrier also states that the employer was employer and cites Sims v. Western Waste Industries, 918 S.W.2d 682 (Tex. App.-Beaumont 1996, writ denied); and carrier states that it did not waive its right to subrogation. Claimants replied that the decision should be upheld.

DECISION

We affirm.

There was testimony from the deceased's wife in regard to the relationship. As to the question of identity of the employer or credit as an advance based on payment from a third party, there was no testimony. All evidence was in the form of insurance contracts, court records, interrogatories, and other documents including a letter.

There was no dispute that deceased was hired by an employer (with "_____" in its name) and was sent for training which included working at heights. Deceased fell to his death while in the course and scope of employment in (state) on _____.

The hearing officer provided a thorough Statement of Evidence which reflects the various insurance policies and action brought in federal court against employer, and (company). (company) is a third party which was involved in conducting training which claimant was undergoing at the time of his death. There is no dispute that (company) paid $65,000.00 in settlement and that approximately $44,000.00 was paid by carrier in workers' compensation which would be recovered from the settlement paid by (company). The questions were whether employer, or one of its subsidiaries was the employer (although not stated as an issue) and whether employer, made payments through other insurers as a third party from which carrier could recover future payments made under workers' compensation; there was argument that carrier had waived its ability to assert its position.

Employer, says that employer was the employer. Employer paid in settlement over one million dollars on behalf of employer. The settlement was referred to as actual damages, not exemplary damages.

While the hearing officer specifies various points in court papers and insurance policies, we observe that a Motion to Intervene filed in June 1998 by carrier represents that it issued a policy "providing benefits . . . to employees of employer, employer" and that decedent was "injured in the course and scope of his employment with employer";

subrogation against (company) was sought. Again in August 1998, carrier, as intervenor, represented itself as having issued a workers' compensation policy "providing benefits . . . to employees of employer, employer"; that document also represented that deceased was injured in the course and scope of employment "with employer." Then in October 1998 carrier filed an amended petition in intervention in which it said it provided a workers' compensation policy to "employees of employer, and employer," also reciting the same point that deceased was injured in the course and scope of employment "with employer" (singular).

While carrier argued that pleadings are not proof as to who the employer is, there is also a Stipulation between carrier and claimant, used in the federal lawsuit, that says carrier issued a workers' compensation policy to "the employees of employer the employer of . . . decedent."

After the trial began a settlement was reached which included amounts to be paid by carrier and other amounts to be paid by Saint Paul Mercury Insurance. In regard to the latter insurance carrier, whose amounts paid on behalf of employer, are sought to be used as a credit for future payments by carrier, a letter dated April 21, 1998, by Mr. C, says that claimant's lawsuit in federal court arises "from allegations outside of any employment relationship between [deceased] and employer" and that the lawsuit relates to "general acts and omissions of negligence arising outside the employment of [deceased] with any of the employer entities. Clearly, these are matters and issues that are not covered under the employers liability policy of insurance issued by [carrier] . . . ." That letter refers to the (insurance company) coverage as "general liability insurance."

It is true that Section 408.001 provides that workers' compensation is the exclusive remedy of an employee against the employer, but does not prohibit exemplary damages. All the reasons why carrier and employer, on behalf of employer, chose to settle with claimants for two million dollars are not fully known. The record reflects that the hearing officer in deciding the issue before him was aware of the representations made that settlement was of actual damages, not exemplary, but the record also indicated that an eye was turned to tax benefits in labeling the settlement as "actual." We note also that concessions were made in the amount of attorney's fees when settlement was made after trial began to make proceeds to claimants similar to what they would have been had settlement occurred before trial.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. While carrier cited the Sims case, we do not believe that case controls the outcome of this case. In that case a parent company was seeking to wrap itself in immunity provided by the 1989 Act for the employer. Claimant appealed a determination that the parent was entitled to immunity. In holding that the parent company was not allowed to assert the alter ego theory of piercing the corporate veil of its subsidiary and thereby able to assert immunity, the court stated that piercing the corporate veil is a "means of imposing liability on an underlying cause of action not escaping it." While there

is some language that the parent is not the employer, the circumstances of Sims will not necessarily be applicable to the case under review.

With not only prior pleadings asserting that Employer, is the employer, but also a stipulation between the parties stating that fact, we cannot say that the determinations that Employer, is the employer, and that carrier (for Employer) is not allowed, under Section 417.002 (third party liability), to take credit for money paid on behalf of Employer, by (insurance company), are against the great weight and preponderance of the evidence.

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