APPEAL NO. 000426

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 February 3, 2000, in (City 1), Texas. At the CCH the appellant (claimant) and the respondent (carrier) agreed that even though other issues were reported as unresolved at the benefit review conference, the issues to be resolved at the CCH were whether the claimant sustained a compensable injury on _____; whether such injury is covered by the 1989 Act; and whether the claimant timely filed his claim for compensation or had good cause for any failure to do so. The parties stipulated that the injury, if any, occurred in territorial waters of Mexico; that at the time of the claimed injury, (employer 1), with its principal place of business in (City 2), Scotland, was the general employer of the claimant; that on _____, the claimant was the borrowed servant of (employer 2), an affiliated but separate company, with its main office in (City 3), Texas; that the claimant filed his Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on July 14, 1998; and that the carrier filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) contesting compensability of the claimed injury on November 16, 1999. The hearing officer determined that on _____, the claimant was injured in the course and scope of his employment as a borrowed servant of (employer 2); that the injury in the course and scope of employment did not cause the claimant to lose one or more days from work during the one year which followed the date of injury; that the claimant was neither hired nor recruited in the State of Texas; that the claimant gave the employer notice of his claimed injury and filed his TWCC-41 with the Texas Workers' Compensation Commission (Commission) on July 14, 1998, a date which is more than one year after the date of injury of _____; that the claimant did not have good cause for not timely notifying the employer of the claimed injury or not timely filing a claim with the Commission; that the claimant's injury sustained on _____, is not subject to a method of compensation established by United States federal law; that the claimant was injured within one year of the time he was initially hired as the borrowed servant of (employer 2); that he did not work in Texas for at least 10 days during the 12 months preceding the date of injury; that Neyrfor Turbodrilling, Inc. maintains a place of business in City 3, Texas; that the claimant did not regularly work at or from the City 3, Texas, location; that prior to his injury on _____, the claimant neither resided in nor spent a substantial part of his working time in Texas; and that the claimant's injury in the course and scope of his employment on _____, is not covered by the 1989 Act. The claimant appealed, contended that the evidence established that he worked in Texas at least 10 days during the 12 months before the date of his injury; argued that the hearing officer did not properly apply the provisions of the 1989 Act concerning timely reporting an injury, timely filing a claim, and waiver; urged that he is entitled to benefits under the 1989 Act; and requests that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The carrier responded, contended that the determinations of the hearing officer are not so against the great weight and preponderance of the evidence

as to be clearly wrong and unjust, urged that the hearing officer properly applied the law, and requested that her decision be affirmed.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a summary of the evidence and a thorough discussion. The claimant testified by telephone from Scotland. He said that he was generally employed by the employer in Scotland and was loaned to affiliated companies of that employer as necessary. He stated that he was paid a basic salary by the Scotland office, that he was paid while he was waiting for work, and that he was paid a bonus when he was on a rig and expenses when he traveled. The claimant stated that he began working in the United States in 1993; that he would go to the office in City 3 to meet with the manager to learn where he would work; that he went to Texas in March 1993 and was there until April 13, 1993; that his diary showed that he was in City 3 or (City 4), Texas, March 26, April 29, September 29 and 30, 1993; and October 1 through 6 in 1993. On cross-examination he said that in January 1994 he did not spend time in Texas, but spent six days in (City 5), Louisiana, before he went to the rig. The claimant said that he was injured on _____; that he returned on February 24, 1994; that sometimes he could not work because he could not put pressure on his knee; that sometimes he had to use a walking stick; that sometimes he was in between jobs; and that he had surgery in 1996. The claimant did not say what day or days he was not able to work.

Mr. P, the general manager of the company with its headquarters in City 3, Texas, testified that if it needed additional employees it would request them and, if they were provided, a daily rate would be charged by the company that provided the employees. He said that on January 19, 1994, the claimant flew to City 4; did not go to the office in City 3; that the same day he flew to City 5, Louisiana; that from there he went to the rig at sea; that the operations on the rig were under the control of the office at City 5; that after completing the work on the rig, the claimant returned to the office at City 5 to debrief that office on his activities at the rig; and that the claimant returned to Scotland through City 4 without going to the office in City 3. Mr. P stated that the claimant's work was supervised out of the City 5 office. In a letter to the attorney representing the carrier dated December 8, 1999, Mr. P said that he checked the files back as far as 1988 and could not find any other record of the claimant coming to the United States other than the dates he had given her. A report from Mr. P to the attorney dated November 30, 1999, states that the claimant was in the United States March 23, and 24, 1993, waiting to go to the drilling location; that from March 25, 1993, to April 13, 1993, he was on a rig in Mobile Bay off Alabama; that from January 19, 1994, to February 1, 1994, he was in Louisiana; that on February 1, 1994, he departed for a rig in Mexico; and that in 1995, he was in Louisiana and Texas. Section 406.071 provides:

EXTRATERRITORIAL COVERAGE. (a) An employee who is injured while working in another jurisdiction or the employee's legal beneficiary is entitled to all rights and remedies under this subtitle if:

(1) the injury would be compensable if it had occurred in this state; and

(2) the employee has significant contacts with this state or the employment is principally located in this state.

(b) An employee has significant contacts with this state if the employee was hired or recruited in this state and the employee:

(1) was injured not later than one year after the date of hire; or

(2) has worked in this state for at least 10 working days during the 12 months preceding the date of injury.

We first address the determinations that the claimant was neither hired nor recruited in the State of Texas, that he did not work in Texas for at least 10 days during the 12 months preceding the injury, that he did not regularly work out of the City 4 office, and that the injury did not cause him to lose one or more days of work during the one year following the injury. 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. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer determined that the claimant was neither hired not recruited in Texas. The claimant did not specifically appeal that determination. Nonetheless, that determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and we affirm it. 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). That determination is sufficient to support the conclusion of law that the _____, injury is not covered by the 1989 Act. The evidence is also sufficient to support the determinations that the claimant did not work in Texas for at least 10 days during the 12-month period before the injury, that he did not regularly work out of the City 4 office, and that the injury did not cause him to lose one or more days from work during the one year following the injury.

Section 409.005, in effect at the time of the injury, provides that an employer shall file a written report with the Commission and the carrier if the injury results in the absence of the employee of that employer from work for more than one day. Section 409.004 provides that the failure to file a claim for compensation with the Commission as required by Section 409.003 (not later than one year after the date of injury) relieves the employer and the carrier of liability unless good cause exists for failure to timely file a claim or the employer or the carrier does not contest the claim. The Appeals Panel has held that the time for the carrier to dispute the claim begins on the day that it receives notice of the claim. Texas Workers' Compensation Commission Appeal No. 94224, decided April 1, 1994; and Texas Workers' Compensation Commission Appeal No. 972717, decided February 17, 1998. The same applies to the employer. In the discussion section in her Decision and Order, the hearing officer stated that the claimant's arguments under Section 409.004 were unpersuasive since both the employer and the carrier contested the claim. She also stated that she interpreted Section 409.004 to require that only the employer or the carrier contest the claim. We do not disagree with her interpretation. The TWCC-41 filed by the claimant is dated July 13, 1998. The claimant introduced documents to show that the Commission and the employer in City 4 signed for copies of the TWCC-41 on July 15, 1998. In a letter to the Commission dated August 7, 1998, (employer 2) stated that the claimant was never an employee of it, that the injury was about four years old and related to an accident that occurred in Mexico, and that this is not a valid claim and should be denied. The copy of that letter in the record does not indicate when it was received by the Commission. In his appeal, the claimant contends that the hearing officer took official notice of the claims file. The Decision and Order of the hearing officer does not so indicate, but it does contain a copy of the Commission's Claim Form List as a hearing officer's exhibit. Since the employer's letter is not a claim form, it would not appear on the Claim Form List. The Claim Form List in the record indicates a TWCC-41 was received on October 21, 1999, and that that form created the claim. There is no mention of the TWCC-41 that was signed for on July 15, 1998. The Claim Form List also indicates that a TWCC-21 was received on November 16, 1999; that a Employer's First Report of Injury or Illness (TWCC-1) was received on December 1, 1999; and that a Form 99, no further identification, was received on January 6, 2000. If the letter from the employer dated August 9, 1999, was timely received it would be sufficient to support an implied determination that the employer timely contested the claim. The TWCC-21 filed by the carrier is dated November 16, 1999. The record indicates that the employer received the TWCC-41 on July 15, 1998, but the first indication in the record of when the carrier received the TWCC-41 is a document that indicates that it was transmitted by the Commission by facsimile to the carrier on November 9, 1999. The hearing officer did not make a finding of fact as to when the carrier first received written notice of the claim. Without such a finding of fact, we do not infer that the carrier timely contested the claimed injury. It would have been preferable for the hearing officer to have made additional findings of fact related to whether the employer and the carrier timely contested the compensability of the claim so that a conclusion of law concerning the provisions of Section 409.004 could have been made. However, under the circumstances of this case, we do not

find it necessary to remand for the hearing officer to make additional findings of fact and conclusions of law.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge