APPEAL NO. 000599

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 18, 2000. The issues at the CCH were whether (employer) was the respondent/cross-appellant=s (claimant) employer for the purposes of the 1989 Act at the time of the claimed injury; whether the claimed injuries occurred while the claimant was in a state of intoxication, thereby relieving the appellant/cross-respondent (carrier) of liability; whether the claimant had disability; and whether the claimant sustained an "injury," damage or harm to the physical structure of the body. The hearing officer determined that claimant was employed by employer at the time of the claimed injury; that the claimed injuries occurred while the claimant was in a state of intoxication, thereby relieving the carrier of liability; and that because the carrier was relieved of liability, claimant did not have disability but did sustain an "injury," damage or harm to the physical structure of the body. The carrier filed a contingent appeal, contending that claimant was not an employee of employer. The claimant appeals requesting that we reverse the hearing officer=s decision on intoxication and render a decision in his favor. As part of his argument, the claimant asserts that he was shown only to have a large amount of nonintoxicating cocaine derivative in his system and not cocaine itself. The carrier responded to claimant=s appeal by asserting that the decision should be affirmed.

DECISION

We affirm the decision on all appealed points.

The claimant was injured on _____, when he was pinned between two steel beams. The claimant said that he was sandblasting, and a crane operator was attempting to turn a beam so he could sandblast the other side. The claimant sustained a ruptured spleen requiring surgical intervention, and later found that he also had a back injury, for which surgery was recommended and which he had.

The claimant had gone to work three weeks previously for employer, and was told that this company would provide workers' compensation coverage. He completed all necessary paperwork with this company and was paid by it; he was assigned to work at (client company) where the accident occurred. The claimant said his training and supervision were done by the client company.

An affidavit from the president of the client company stated that part of the money paid to the employer for its leasing administrative services included workers' compensation coverage to be provided by the employer. The affidavit attached what purported to be the written agreement between the employer and the client company; however, this is nothing more than a letter written by a person for employer setting out the billing rates. This letter states that claimant was covered by "Workers Comp Code 3040." Although the affidavit from the president asserts that the client company was a subscriber, no carrier is identified, nor was such carrier (if not the carrier here) ever made a party to this action.

An affidavit from the risk manager for the employer agreed that claimant was an employee of the employer, but was working under the supervision of the client company. The risk manager stated that the business of the employer was to provide temporary and leased employees to other companies. The risk manager asserted also an agreement to provide workers' compensation insurance for employees assigned to work for the client company. The risk manager, nevertheless, asserted that claimant was under the supervision and direction of the client company when injured. The employer's handbook, in evidence, makes clear that hiring and firing decisions are those of the employer, and that workers' compensation will be provided through the carrier.

Claimant denied he had cocaine either that morning before work or the night before. His wife testified that she did not see him consume cocaine, and he did not go anywhere else the night before. No assertion was made by the claimant at the CCH that he had actually ingested any benign substance that would include one of cocaine's metabolites.

On the day he was injured, a urine sample showed 300 ng/ml of cocaine metabolite, and, when tested by gas chromatography, 669 ng/ml. The claimant hired Dr. C as his expert, and the carrier hired Dr. K. Essentially, Dr. C argued that the test did not show actual active cocaine in claimant's system but rather a derivative which was nonintoxicating and staying in the system for up to three days following ingestion. Dr. K argued that cocaine is a substance reliably indicated by the presence of one of its metabolites because the actual drug was not excreted, and that the level found in claimant would mean he in all probability did not have the normal use of his faculties when the accident occurred.

Statements from workers who were at the job site on the day of claimant=s accident were produced that essentially purported not to observe anything out of the ordinary in claimant's demeanor on the day of the accident. However, these statements also indicated that he was trained not to walk between the beams as they were being moved, and that when the movement started, he had been six to ten feet away and suddenly was between the beams, which meant that he must have walked into the path of the beams.

CARRIER'S APPEAL

In essence, the carrier argues that it may collect premiums through its insured, whose sole business is to lease out employees, but not ever pay benefits if such employees operate under the direction and control of the companies to whom they are furnished. However, "right of control" or borrowed servant issues will not in every case also resolve the issue of "coverage" or liability. We have rejected a similar argument made by the carrier in Texas Workers' Compensation Commission Appeal No. 962625, decided February 7, 1997, which cited the case of Pederson v. Apple Corrugated Packing, Inc., 874 S.W.2d 135 (Tex. App.-Eastland 1994, writ denied). This case also stated that Texas Workers' Compensation Commission Appeal No. 960711, decided May 22, 1996 (cited by carrier here), could not be taken as authority that a claimant could not recover benefits through a temporary services

company that furnished him or her to a client company and procured workers' compensation insurance. In this case, the uncontroverted evidence furnished by both the employer and the client company was an intent and agreement that the carrier provide workers' compensation benefits for injured temporary workers such as claimant. This agreement did not cease to have effect when facts occur that cause those benefits to actually be claimed and the carrier has offered no cogent rationale as to why it should be permitted to avoid coverage it has contracted to provide, to the insured whose primary business it could not have failed to know.

The hearing officer found that claimant was a temporary common worker under Chapter 92 of the Texas Labor Code. Section 92.021 states that the "license holder" (the company furnishing such workers) is the employer of such employees. We also note that the Staff Leasing Services Act, at Section 91.042, provides that the staff leasing services company and the client company will be considered coemployers, and that the "license holder" may elect to provide workers' compensation insurance. Frankly, there was little, if any, evidence to prove which of these chapters applied or whether the employer was a license holder in accordance with Chapter 91 or 92; however, it is clear to us that a finding that the arrangement was covered by either chapter results in coverage through the carrier in this case and liability for benefits. We note that the Texas Supreme Court has held that the Staff Leasing Services Act supercedes common-law right of control. Texas Workers' Compensation Insurance Fund v. DEL Industrial, Inc., (Docket No. 98-0946, decided September 15, 1999.

The hearing officer's decision that carrier is liable for benefits is sufficiently supported and is affirmed.

CLAIMANT'S APPEAL

The claimant essentially argues that the evidence it produced was more credible than that produced by the carrier. All arguments made and evidence admitted on this point were for the hearing officer to consider. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). She evidently concluded, from the test results as well as the behavior of the claimant on the date of his injury, that he did not have the normal use of his faculties when judgment was called for on the date he was injured. We cannot agree that Dr. K's evidence was not probative on the state of intoxication of the claimant, or that the burden was not shifted by the test results of claimant's urine.

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 is the case here, and affirm her decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge