APPEAL NO. 011244
FILED JULY 16, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 11, 2001. With respect to the issues before her, the hearing officer determined that the respondent (claimant) was the employee of VF for purposes of the 1989 Act at the time of the claimed injury; that the claimant sustained a compensable injury on _____; and, that she had disability resulting from the injury sustained on _____, through the date of the hearing. The appellant (carrier) appealed on sufficiency grounds. The carrier also asserted error in an evidentiary ruling made by the hearing officer. In her response, the claimant urges affirmance.

DECISION

Affirmed.

On appeal, the carrier asserts that the hearing officer erred in excluding evidence regarding the contractual relationship between the claimant and TMD. The carrier also contends that the hearing officer erred in failing to permit the witnesses to look at the excluded documents to refresh their recollections and in not allowing the documents to be used for rebuttal purposes. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) provides that the parties shall exchange documentary evidence no later than 15 days after the benefit review conference. Section 410.161 of the 1989 Act provides that if a party fails to timely exchange documents without good cause, that party may not introduce the evidence. The hearing officer determined that there was not a timely exchange of the documents, and excluded them. Additionally, the hearing officer refused to allow the witnesses to look at the documents to refresh their recollections or to allow the documents to be used as rebuttal evidence. It has been held that to obtain a reversal of a judgment based upon an error in the admission or exclusion of evidence, the appellant must show that the evidentiary ruling was, in fact, error, and that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The excluded documents were employment records from TMD. It was undisputed that the claimant was hired by TMD, and that she received and signed certain documents in connection with her employment. None of these documents are dispositive of the issue of whether the claimant was a borrowed servant. Thus, any error in the exclusion of the carrier's evidence does not rise to the level of reversible error.

The hearing officer did not err in deciding that the claimant was an employee of VF for purposes of the 1989 Act at the time of the claimed injury. As stated earlier, it is undisputed that the claimant was hired by TMD and sent by them to a work assignment at

VF. While at VF, the claimant was under their direct supervision. A VF manager told the claimant what to do and how to do it, set her hours, and told her when to take breaks. An employee of a general employer may become the borrowed servant of another, and that is a question of fact. Sparger v. Worley Hospital, Inc., 547 S.W.2d 582 (Tex. 1977). To determine whether or not an injured worker has become a borrowed servant, the question is which company has the right to control the activities of the servant. Goodnight v. Zurich Ins. Co., 416 S.W.2d 626 (Tex. Civ. App.-Dallas 1967, writ ref'd n.r.e.). Payroll is not dispositive of this inquiry. Texas Workers' Compensation Commission Appeal No. 92287, decided August 14, 1992. The 1989 Act makes the hearing officer the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer's determination that VF was the claimant's employer for purposes of the 1989 Act is supported by sufficient evidence, and that determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Accordingly, it will not be disturbed on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer also did not err in deciding that the claimant sustained a compensable injury on August 22, 2000, and had disability resulting from the compensable injury from August 23, 2000, through the date of the hearing. The hearing officer determined that the claimant's account of the accident and her injuries was credible. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Ins. Co., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer's injury and disability determinations are not so against the great weight of the evidence as to compel their reversal on appeal. Pool, *supra*; Cain, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge