APPEAL NO. 011531
FILED AUGUST 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 (CCH) was held on February 16, 2001, and closed on June 12, 2001. The hearing officer determined that the respondent (claimant), represented by his legal guardian at the CCH, sustained a compensable injury in the course and scope of his employment on _____. At the time, the claimant had been a general employee of (Employer No. 1), which was insured by respondent (Carrier No. 1). Although there were no fact findings on the identity of the claimant's employer and the liable carrier on the date of injury, the hearing officer made conclusions of law that (Employer No. 2) was the employer of the claimant at the time of his injury, who was insured through appellant (Carrier No. 2) (the discussion indicates that this was based upon the "borrowed servant" doctrine). He found that the claimant did not elect to retain his common-law rights against Employer No. 2. Although he declined to add an issue on whether Carrier No. 1 waived its right to dispute its liability for the claim, he decided the issue by finding that they did not. He held that Carrier No. 1 was entitled to reimbursement from Carrier No. 2 "from August 21, 2000 to the present and continuing as long as benefits are due under the [1989] Act."

Carrier No. 2 has appealed, arguing that the claimant failed to sustain his burden of proof on injury, and that Employer No. 1 was the employer for purposes of workers' compensation. Carrier No. 2 also argues that the hearing officer erred in ordering Carrier No. 2 to reimburse Carrier No. 1, absent an interlocutory order from the benefit review officer (BRO). Carrier No. 2 argues that Carrier No. 1 has waived the right to dispute its liability and that the hearing officer erred by finding the contrary. Carrier No. 1 seeks affirmance. There is no response from the claimant.

DECISION

We reverse and render on the reimbursement issue; we strike the determination that Carrier No. 1 did not waive the right to dispute compensability, because this issue was not made part of the issues before the hearing officer; and we otherwise affirm the hearing officer's decision as supported by the record in this case.

While the record is voluminous and the issues were hotly contested, the case boils down to what effect the outcome of personal injury litigation between the claimant and Employer No. 2 should have on workers' compensation benefits. Regrettably, the complexity of the case and issues therein are not reflected in the discussion or findings of fact and conclusions of law in this decision. We will briefly summarize the facts.

The claimant, who was represented at the CCH by his legal guardian, was hired by Employer No. 1, a day labor service, and then sent to Employer No. 2. He was gravely injured on his first day of work for Employer No. 2 when he fell 20 feet onto his head. Medical records

show he was hospitalized from May 16 through June 20, 1997, for treatment of a closed head injury and skull fracture. The history of injury is given as a fall at a construction site.

The adjuster for Carrier No. 1 agreed that she had not disputed the claim by asserting a borrowed servant defense because of the nature of the business of its insured, Employer No. 1, which she said made all of its insured employees "borrowed servants." Carrier No. 1 began payment of benefits, most of which involved medical benefits for an assisted living/rehabilitation center in which the claimant still lived, requiring 24-hour care. The adjuster for Carrier No. 1 said that investigation of the circumstances of the accident had been thwarted by Employer No. 2.

On the matter of the claimed reimbursement, Carrier No. 1 sought reimbursement for benefits paid only since August 21, 2000, the date of the benefit review conference (BRC) held in this case. The adjuster for Carrier No. 1 testified that medical benefits in the amount of $104,909.00 and indemnity benefits of $1,924.00 had been paid to the date of the CCH. The BRO did not issue an interlocutory order for payment of benefits.

A third party lawsuit was brought against Employer No. 2 on February 2, 1998, for negligence, initially by Carrier No. 1 (to enforce subrogation rights) and then by the guardian for the claimant as intervener. The parties were "realigned" so that the claimant was plaintiff and Carrier No. 1 was made intervener.[1]

While much was presented and argued about what was or was not said in depositions given by representatives of both employers before the court case was decided, it was Employer No. 2's constant and consistent position in district court that no negligence action would lie against Employer No. 2 because the claimant was its borrowed servant and it was covered by workers' compensation insurance, which was the exclusive remedy for redressing the claimant's injuries. Employer No. 1 countered this, but Employer No. 2 prevailed on this point in its motion for summary judgment; it asserted in this 12-page motion that it had the right of control over the claimant. There is nothing in the record to suggest that either Carrier No. 1, the claimant, or Employer No. 2 asserted that the claimant had retained his common-law rights as set forth in Section 406.034. The district court granted summary judgment on July 15, 1999, and held that the claimant was the borrowed servant of Employer No. 2 and the tort action was barred by the exclusive remedy provisions set forth in Section 408.001.

The summary judgment was appealed by the claimant and Employer No. 1 on the basis that Section 92 of the Texas Labor Code made day labor services the exclusive employer of day laborers (like claimant) as a matter of law. The court of appeals, however, ruled that this act did not do away with traditional notions of borrowed servant, and affirmed the decision of the trial court that Employer No. 2 was the employer of the claimant by virtue of the "borrowed

[1] It was explained that Carrier No. 1 initially filed suit pending resolution of the claimant's guardianship. Subsequent pleadings name Employer No. 1 as the intervener.

servant" doctrine. (The cite is not included to preserve confidentiality of parties in this claims file, but a copy of the case was given to the hearing officer at the CCH.)[2]

A representative for Employer No. 1, Mr. B, described how workers were hired in labor halls, given a "work ticket" from a particular job, and went out to that job. Mr. B said that there was no written contract between Employer No. 1 and Employer No. 2, and that supervisors were not sent out with the workers. Mr. B said he was not aware of any demand by Employer No. 2 that a portion of its payment for day workers go toward workers' compensation, and that such a request would have been turned down by Employer No. 1.

Mr. B said that it was Employer No. 1's position to go ahead and pay workers' compensation benefits, but if one of its customers asserted that the injured worker was its borrowed servant, then their position became that its customer company would bear the responsibility for workers' compensation. Mr. B agreed that at one point, Employer No. 1 had been a nonsubscriber to workers' compensation (and used ERISA plans instead), and it was around that time that a boilerplate paragraph[3] was included in its contracts with temporary workers whereby they agreed to waive any rights they might have under workers' compensation. Mr. B said that customers of Employer No. 1 would never see this contract. Mr. B, who was also an attorney, stated that it was his understanding that this provision was legally void and unenforceable. An agreement with this provision was signed by the claimant on April 4, 1997. Mr. B said that it was his understanding that the premiums paid to Carrier No. 1 were paid for the temporary laborers.

There was no evidence that the claimant executed any document purporting to retain his common-law rights against Employer No. 2 within five days after beginning work for Employer No. 2. Mr. B stated his recollection that the claimant had worked for Employer No. 1 at times previous to his date of injury and assignment to Employer No. 2.

The adjuster for Carrier No. 2 stated that his company first became aware of the claimant's injury on July 24, 1998, from its insured, and filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on July 27, 1998, asserting that the claimant was not its employee. Its involvement came to a halt when, after this, Carrier No. 2 was informed that Carrier No. 1 was paying benefits. The adjuster testified that Carrier No. 2 was unaware of the personal injury litigation prior to June 2000. The adjuster said that Carrier No. 2 subpoenaed medical records of the claimant and became aware that he was HIV positive, and filed another TWCC-21 on November 8, 2000, to dispute the extent of injury. The adjuster indicated on direct testimony that the passage of time had prejudiced its right to be involved in the medical treatment or in obtaining witness testimony, but also indicated that the only

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[2] No pending actions were found on this case in a search of WESTLAW.

[3] After a paragraph noting that the insurance and/or workers' compensation program has been explained, the contract states, all in capital letters: "The temporary worker agrees to waive any and all rights which he might have under any Workers' Compensation Act while the terms of this agreement are in effect. The temporary worker agrees to pursue any action he might have under common law."

investigation done within the first 60 days after written notice of injury was to contact one representative of Employer No. 2 who asserted that the claimant was not its employee. Finally, the adjuster for Carrier No. 2 conceded that its only defense had to do with the identity of the employer, not any other defense. The adjuster testified that Carrier No. 2 became aware during his initial investigation (by other adjusters) that the claimant sustained a head injury from a fall.

We note that some of the evidence presented by Carrier No. 2 consists of evidence or affidavits from employees of Employer No. 2 that purport to disavow the employment status of the claimant at the time of his injury. For example, the treasurer of Employer No. 2 has furnished an affidavit stating that the claimant was not an employee of its company and was not therefore covered by its own workers' compensation policy. There was some evidence that a predecessor company of Employer No. 1 had, back in 1989 and 1990, indicated to Employer No. 2 that it would provide workers' compensation coverage for supplied employees.

CARRIER WAIVER ISSUE

At the beginning of the CCH, Carrier No. 2 sought to have an issue added as to whether Carrier No. 1 waived the right to dispute compensability. While the hearing officer said he would not allow addition of the issue, he announced what he would find on that point. Specifically, he found that there was no waiver by Carrier No. 1, and, in his discussion, based this on the theory that there was no requirement for Carrier No. 1 to react to a "coverage issue." Because an issue not raised at the BRC, or under the circumstances set out in Section 410.151(b), may not be considered by the hearing officer, his decision results from a matter he could not consider and is void. We therefore strike the conclusion of law purporting to determine a waiver "issue."

INJURY ISSUE

The hearing officer did not err in finding that the claimant sustained a compensable injury on_____. The matter of a serious injury to the claimant was a running theme in all documentary evidence in the case. It was undisputed. The adjuster for Carrier No. 2 agreed that the identity of the employer was the only defense that was indicated by its investigation. The decision is amply supported by the record.

IDENTITY OF THE CLAIMANT'S EMPLOYER AT THE TIME OF INJURY

Under the facts of this case, the hearing officer did not err in finding that the claimant was the borrowed servant of Employer No. 2 when he was injured. Curiously, Carrier No. 1 does not argue that the court adjudication of the pivotal issue collaterally estopps Carrier No. 2 from asserting the contrary position (through evidence derived from Employer No. 2). However, Carrier No. 2's case at the CCH was quite obviously hampered by the fact that its

insured had prevailed in a lawsuit on the very issue at the heart of the dispute here: whether the claimant was the borrowed servant of Employer No. 2 on the date of his injury. Carrier No. 2 was therefore cast in the somewhat bizarre posture of arguing that pleadings or discovery done prior to rendition of that judgment were binding on the hearing officer as evidence or admissions (including judicial admission), but that the ultimate resolution of these facts by a district court was not. We disagree.

Employer No. 1 was not the only party in making "judicial admissions" to the district court as to right of control over the claimant in its pleadings. The "judicial admission" ultimately credited by the court was that of Employer No. 2, which it made in its motion for summary judgment. The determination that the claimant was the borrowed servant of Employer No. 2 is supported by the record.

EMPLOYEE RETENTION OF COMMON-LAW RIGHTS

The hearing officer did not err in holding that there had been no retention of common law rights by the claimant. Section 406.034 provides that an employee who elects to retain his common law rights must notify "the employer" in writing within five days after the date on which the employee begins his employment.[4] The claimant began his employment with Employer No. 2, as a borrowed servant, on May 16, 1997, and there was no evidence that he informed Employer No. 2, within five days, of his desire to retain his common-law rights. Whether legal or not, the boilerplate provision set out in an agreement signed by the claimant over a month before, for Employer No. 1, did not satisfy the requirements of Section 406.034.

REIMBURSEMENT OF CARRIER NO. 1

We agree that the hearing officer erred in determining that Carrier No. 1 was entitled to past and future reimbursement of benefits paid, and render a decision that the hearing officer was without authority to order reimbursement to Carrier No. 1 from Carrier No. 2. We must first note that no fact findings support the legal conclusion that there is an entitlement to reimbursement of any specified amounts that were paid by Carrier No. 1. There are no findings of fact supporting any sort of equitable relief (if that was the hearing officer's intent, and it is not apparent from his discussion). The discussion provides no cogent legal or factual explanation for ordering reimbursement only from the date of the BRC (since, presumably, Employer No. 2 has been the "employer" of the claimant from the date of his injury) and into the indefinite future. We are likewise struck that the briefs of Carrier No. 1 on file in this case offer no legal authority for the argument that the hearing officer may order an "equitable" reimbursement under the facts of this case. There is a point at which the Appeals Panel cannot imply findings never made without entering wholly into the role of fact finder, and that

[4] At least one reported Texas case assumes that this notice must be given to the "borrowing" employer of a temporary services employee. *See* Williams v,. APS, Inc. 969 S.W.2d 433 (Tex. App.-Houston [14th Dist.] 1997, no writ).

is the case here. The decision of the hearing officer may be reversed on the failure of the decision to include supporting findings of fact, leaving aside the other arguments raised by Carrier No. 2.

We agree that there are "split" Appeals Panel decisions on this that have to do with "jurisdiction" of the hearing officer to entertain such an order. Texas Workers' Compensation Commission Appeal No. 961448, decided September 9, 1996, held that an interlocutory order from a BRC was not required to confer jurisdiction on the hearing officer to order reimbursement. However, this decision was distinguished and essentially overruled in Texas Workers' Compensation Commission Appeal No. 992012, decided November 4, 1999, which held that an interlocutory order was required, and, in so doing, based its decision on interpretation of the only statutory provision speaking to the right of reimbursement where there are multiple carriers who may be liable for compensation.

As that decision correctly noted, administrative agencies generally derive their powers from legislative enactment. Section 410.033 is the only statute addressing the situation of reimbursement in the case of multiple carriers who may be liable for benefits. As the decision in Appeal No. 992012, *supra*, held, the "share" referred to in 410.033(b) for which a carrier might claim reimbursement from another carrier refers back to the "share" ordered by a BRO in an interlocutory order.[5] Although Texas Workers' Compensation Commission Appeal No. 000129, decided March 6, 2000, "muddied the waters" by allowing reimbursement where one carrier was cast by the hearing officer as a "subclaimant," no such finding or contention was made in the case before us.

We therefore reverse and render a decision that the hearing officer was without authority to adjudicate the matter of reimbursement between the parties. We strike the determination on the issue of Carrier No. 1's "waiver," which was not before the hearing officer. Otherwise, we affirm the decision and order of the hearing officer on all appealed points, finding that they are not so against the great weight and preponderance of the

[5]We would further observe that even if Section 410.033(b) were held to be applicable in the absence of an interlocutory order, it expressly requires that "final determination" of liability is required to trigger a right to reimbursement. There was no "final determination" of Carrier No. 2's liability presented to the hearing officer for his consideration in this case.

evidence so as to be manifestly unfair or unjust. *See* Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Michael B. McShane
Appeals Judge