APPEAL NO. 011605
FILED AUGUST 29, 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 June 13, 2001. With respect to the issues before her, the hearing officer determined that employer #1 and employer #2 were co-employers of the respondent (claimant) at the time of his _____, compensable injury. The hearing officer further determined that appellant (carrier #1) waived the right to contest the compensability of the claimant's _____, injury because it failed to dispute that employer #1 was the employer of the claimant in accordance with Section 409.021 of the 1989 Act. Carrier #1 appeals and seeks reversal, arguing that its insured, employer #1, cannot be considered to be a co-employer of the claimant under these circumstances and that the hearing officer erred in determining that it had waived its right to contest compensability, noting that coverage cannot be created by waiver. Respondent (carrier #2) responds and urges affirmance. There is no response in the file from the claimant. In addition, carrier #2 did not appeal the determination that employer #2 was the claimant's employer pursuant to the borrowed servant doctrine and that employer #2 was a subscriber to workers' compensation insurance coverage with carrier #2; thus, that determination will not be discussed further.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant was also an employee of employer #1 at the time of his _____, compensable injury.[1] There is precedent in both Appeals Panel decisions and Texas case law allowing for instances of co-employment. *See* Texas Workers' Compensation Commission Appeal No. 981848, decided September 21, 1998; Texas Workers' Compensation Commission Appeal No. 002414, decided November 16, 2000; and, Brown v. Aztec Rig Equip., 921 S.W.2d 835 (Tex. App.–Houston [14th Dist.] 1996, writ denied)[2]. There is, in the common law, also the "co-employment doctrine" which states that "[a] person may be the servant of two masters, [who are] not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other in Texas." Brown, 921 S.W.2d at 843. Thus, we find no merit in carrier #1's assertion that there can only be one employer.

[1]The parties agreed that the Staff Leasing Services Act, TEX. LAB. CODE ANN. § 91.001 *et seq*., is inapplicable to this case.

[2]In that case, the agreement between the employers stated that they would be "co-employers" for the purpose of the work during which the employee was injured. However, the court gives rationale based on the general principles of co-employment as well.

In this instance, the agreement between employer #1 and employer #2 stated that the claimant was to be an employee of employer #1 and was to be covered by employer #1's workers' compensation insurance. Indeed, the hearing officer's determination that employer #1 is an employer and that carrier #1 is liable for benefits by virtue of the contract between employer #1 and employer #2 is consistent with our decision in Texas Workers' Compensation Commission Appeal No. 962625, decided February 7, 1997. The hearing officer's determinations that employer #1 was an employer of the claimant at the time of his compensable injury and that carrier #1 is, therefore, liable for benefits as the carrier for employer #1 at the time of the compensable injury are supported by sufficient evidence and are not so against the great weight of the evidence as to compel their reversal on appeal. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The hearing officer did not err in determining that carrier #1 waived the right to contest the compensability of the claimant's _____, compensable injury because it failed to dispute that employer #1 was the employer of the claimant on the date of injury within 60 days of the claim, in accordance with Section 409.021 of the 1989 Act. Section 409.021(c) of the 1989 Act reads, "If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period."

Here, carrier #1 paid the claimant medical and indemnity benefits after his _____, compensable injury. In spite of the fact that carrier #1 first received notice of this claim March 23, 1998, it did not contest the compensability of the claim on any grounds prior to the 60th day after the date it was notified. The record reflects that only after summary judgment was granted in carrier #1's subrogation action in district court against employer #2 and the determination was made that workers' compensation was the exclusive remedy did carrier #1 request a benefit review conference and argue that employer #2 was the claimant's employer for purposes of the 1989 Act on the date of injury. Carrier #1 now argues that carrier #2 should be liable for the benefits already paid, as well as future benefits.

Carrier #1 argues that coverage cannot be created by waiver citing Houston General Ins. Co. v. Association Cas. Ins. Co., 977 S.W.2d 634 (Tex. App.-Tyler 1998, no writ). However, carrier #1's reliance on that case is misplaced. As noted above, the evidence in the record shows that carrier #1 contracted with employer #1 to provide workers' compensation coverage for employer #1's employees that was effective on the claimant's date of injury. In addition, employer #1 contracted with employer #2 to provide the workers' compensation coverage for its employees working at employer #2's work site. Thus, carrier #1's coverage was created by contract and was not created by waiver as carrier #1 contends. The actual issue in this case is whether carrier #2 would also have coverage under the borrowed servant doctrine. The hearing officer determined that carrier #1 waived its right to pursue this potential defense to liability by failing to raise that argument within the 60 days

provided for doing so. In making that determination, the hearing officer noted that carrier #1 had access to the information indicating that employer #2 had the right of control over the claimant at the time of his injury and that, as such, its delay in raising the argument that carrier #2 was liable for benefits herein was not excused. The record supports the hearing officer's determination in that regard and nothing in our review of the record compels its reversal.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge