APPEAL NO. 020608
FILED MAY 1, 2002

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 February 21, 2002. With regard to the specific issue before him, the hearing officer determined that (C Co.), was not the appellant=s (claimant) employer for the purposes of the 1989 Act.

The claimant appeals, asserting that Section 406.124 of the 1989 Act makes C Co. liable as the employer because it had subcontracted Awith the intent to avoid liability as an employer.@ The file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

The agreed upon stipulation on the record was that the claimant Asustained a compensable injury on _____@; that MJ was one of C Co.=s subcontractors who had hired the claimant; and that MJ was the claimant=s employer. Other undisputed facts are that C Co. had a large construction project; that C Co. had some 25 or so subcontractors, one of which was MJ; and that C Co. carried workers= compensation coverage on his office employees, superintendents, and Athree or four laborers.@ C Co.=s vice president testified that 85 to 90% of its subcontractors had workers= compensation before they entered into a contract with C Co. and that while audits were conducted annually, in this case the audit was not done until several months after the claimant=s injury.

The claimant was a framer and sustained a serious eye injury when a metal object hit him in the left eye. MJ took the claimant to a hospital and there was some testimony that initially MJ represented that he would be responsible for the claimant=s medical expenses but later Areneged@ on his word. A portion of the contract between MJ and C Co. stated:

> **INSURANCE**. Before commencing the work the Subcontractor [MJ] shall provide and maintain at his own expense with a company or companies satisfactory to the Contractor [C Co.] certain insurance coverage to include but is not limited to:
>
> A) Workmen=s Compensation and employers liability insurance covering all his employees as required by law of an employer.
>
> B) Comprehensive liability insurance against all hazards . . . .

It was noted that Texas does not have a mandatory workers= compensation requirement of employers. C Co.=s vice president testified that subcontractors are asked if they have workers= compensation coverage and he takes the subcontractor=s word as to whether they do or not. He also testified that in some cases, depending on the job, C Co. might accept a subcontractor who did not carry workers= compensation coverage.

Section 406.124, under which the claimant seeks relief, provides:

> If a person who has workers' compensation insurance coverage subcontracts all or part of the work to be performed by the person to a subcontractor with the intent to avoid liability as an employer under this subtitle, an employee of the subcontractor who sustains a compensable injury in the course and scope of the employment shall be treated as an employee of the person for purposes of workers' compensation and shall have a separate right of action against the subcontractor. [Emphasis added.]

The claimant contends that C Co.=s failure to require MJ to submit a certificate of insurance Abefore commencing the work@ and its failure to follow up on the requirement for workers= compensation insurance equates to a Aspecific intent to avoid liability.@

The hearing officer found:

FINDINGS OF FACT

> 6. [MJ] entered into a written agreement with the [C Co.] that evidenced a relationship in which [MJ], as a subcontractor. Assumed the responsibilities of an employer for the performance of the work, thereby making the employees hired by [MJ] his employees and not the employees of [C Co.] for the purposes of the [1989 Act] as per Texas Labor Code Ann. ''406.122(b).
>
> 7. [C Co.], who has workers= compensation insurance, did not hire subcontractors like [MJ] to do the work in order to avoid liability as an employer as per Texas Labor Code Ann. ''406.124.

In that Section 406.124 requires a finding of an Aintent to avoid liability@ and findings of such an intent are factual determinations solely within the prerogative of the hearing officer, as the fact finder and sole judge of the weight and credibility of the evidence (Section 410.165(a)), we can neither say that the hearing officer erred as a matter of law nor that his determinations are against the great weight and preponderance of the evidence.

Accordingly, the hearing officer=s decision and order are affirmed.

The true corporate name of the insurance carrier is **ZURICH NORTH AMERICA** and the name and address of its registered agent for service of process is

GARY SUDOL
ZURICH NORTH AMERICA
9330 LBJ FREEWAY, SUITE 1200
DALLAS, TEXAS 75243.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Robert E. Lang
Appeals Panel
Manager/Judge