APPEAL NO. 022722
Filed December 16, 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 (CCH) was held on September 25, 2002. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; that the claimant had disability from February 24 through April 2, 2001; that (Company M) was the claimant's employer for purposes of the 1989 Act; and that the claimant is not barred from pursuing worker's compensation benefits because of an election to receive benefits under a "third party settlement." The appellant (carrier) appeals those determinations. There is no response from the claimant contained in our file.

DECISION

Affirmed.

The pertinent facts are largely undisputed. The claimant was a day laborer. The claimant testified that he completed the paperwork and was hired to work for (Company R) on February 22, 2001. The claimant was told to report to the headquarters of Company R (apparently a subsidiary of the employer) by 3:00 p.m. the following day wearing a T-Shirt for the client company that he was given by the employer. After he arrived at the employer's location, he was told that a ride would be provided for him by another employee of the employer; the employer's van was reportedly broken down and the van driven by the other employee was his personal vehicle. Eight employees of the employer who were going to the client company were riding in the van. On the way to the job they were involved in a motor vehicle accident (MVA) which was the van driver's fault and the claimant was injured. The claimant testified that he has not worked since the date of injury, _____, although his treating doctor has released him to return to work on April 2, 2001.

The claimant hired an attorney to represent him on a personal injury claim against the driver of the vehicle in which he was riding. There were few documents submitted that indicated the basis of the claim, except for correspondence from the claimant's personal injury attorney to an adjuster for an insurance company whose identity was unclear, but did not appear to be the workers' compensation carrier, along with a settlement document signed by the claimant. The letter from the attorney indicated that a claim was settled with the driver's insurance company and it was stated that the proposed settlement did not cover lost wages. The claimant's share of the settlement was $17,000. The insurance companies named in the release document do not expressly correspond to the insurance company for the driver that was named on the police report for the MVA. The very broad language of the release appears to release those in privity to the driver and his insurance companies as well as "all other persons, firms, corporations, associations or partnerships of and from any an (sic) all claims…" growing out of the MVA.

The claimant testified that no one ever told him that pursuing a claim against his coworker could have consequences on his pursuit of a workers' compensation claim. His attorney declined representation on a workers' compensation claim after making an initial demand for compensation and is holding in excess of $8,000 in trust for the claimant pending the outcome of the workers' compensation claim.

WHETHER THE CLAIMANT WAS INJURED IN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH THE EMPLOYER

Section 401.012(a) defines "employee" to mean a "person in the service of another under a contract of hire, whether express or implied, oral or written." Similarly, Section 401.011(18) defines "employer" to mean a "person who makes a contract of hire . . . ." The hearing officer found that there was a contract of hire between the claimant and the employer at the time of the injury and this is clearly supported by the evidence. The carrier's second tier argument, that the "going and coming" transportation rule applies, is also without foundation. The claimant had already reported to the employer's headquarters. He was subsequently sent out at the direction of the employer to its customer's location and told to ride with another employee who would drive everyone. If transportation to the "place of employment" as set out in Section 401.011(12)(A) had not already ended when the claimant arrived at the employer's headquarters, then the claimant was clearly traveling from one place to another at the employer's direction, Section 410.011(12)(A)(iii). The travel would not have been undertaken but for the business of the employer. The hearing officer's determination that the claimant was within the course and scope of his employment at the time of the MVA is sufficiently supported; indeed, a contrary finding would have been against the great weight and preponderance of the evidence.

WHETHER THE CLAIMANT MADE AN ELECTION OF REMEDIES THAT PRECLUDES RECOVERY FOR WORKERS' COMPENSATION

The carrier's argument that there has been an election of remedies that releases it from liability for compensation is based primarily on the "exclusive remedy" provision found in Section 408.001(a), which states:

> Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or work-related injury sustained by the employee.

As the carrier's argument goes, because the claimant brought a "prohibited" claim against a coworker, the claimant necessarily made an election of remedies that discharges it from liability for the claim. No authority is cited for this interpretation of the statute. We note that the carrier bore the burden of proving that an election of remedies was made. Unassisted by evidence, the Appeals Panel cannot conclude, as the carrier argues, that the claim against the driver of the vehicle was necessarily predicated on

respondeat superior or that the workers' compensation claim is antagonistic to the claim against the driver. Indeed, it appears from the attorney's correspondence that lost wages were not a component of the settled claim at all.

Although the carrier argues that Section 408.001(a) is a "prohibition," we believe that it operates to create an affirmative defense against a personal injury claim by an employer or its agent or employee. The employer/defendant may assert that workers' compensation is the exclusive remedy and thereby defend against a claim for ordinary negligence for a work-related injury. When a coworker who is sued does not defend by asserting exclusive remedy, however, we cannot read this statute as imposing an election of remedies, especially when this doctrine has been held in the case of Valley Forge Ins. Co. v. Austin, 65 S.W.3d 371 (Tex. App.-Dallas 2001, no pet. h.) as not applicable to the 1989 Act by virtue of Section 409.009. The attorney for the claimant on the claim against the driver described the settlement as a "third party" settlement; Section 417.001(a) makes clear that a third party claim may be pursued side-by-side with a workers' compensation claim with no election being made. (While the carrier in this case may have a right of subrogation under Section 417.001(b), this is beyond the issues before the hearing officer).

We believe the rationale the court used in Austin is equally applicable in our case. With the 1989 Act, the Texas Legislature enacted Section 409.009 that defined a subclaimant and provided provisions that governed when a subclaimant could file a claim with the Texas Workers' Compensation Commission (Commission), affording "protection to private heath insurers who have provided health care to an employee covered by the [1989] Act by allowing private health insurers an avenue for financial redress through the [Commission.]" Austin, *supra*. "By their enactment, these statutes effectively eliminated the possibility of an employee's double recovery." Austin, *supra*. "Because any subclaimant…could be made whole regardless of whether the employee pursued group health insurance benefits and workers' compensation benefits, there could be no inconsistent position." Austin, *supra.* "Without inconsistent positions, the common-law election of remedies doctrine is no longer a viable affirmative defense to the pursuit of a workers' compensation claim." Austin, *supra*. Similarly, the third-party liability statute operates to preclude double recovery.

Finally, the carrier argues that the release signed by the claimant operated to discharge it of liability for workers' compensation. However, the CCH does not operate as a court of general jurisdiction for purposes of construing the effect of such a release, especially given scant development of the facts underlying this claim as exists in this record. Likewise, because we do not agree that there was an election or a choice proven in this case, we will not pursue a line of analysis as to whether the nonexistent choice was "informed."

There is both legal and evidentiary support for the hearing officer's determination that the claimant did not exercise an election of remedies and that determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers'

Compensation Commission Appeal No. 001360, decided July 27, 2000. Because the appeal of the disability period is predicated on the argument that there was no compensable injury, and we affirm the determination that there was, the hearing officer's decision and order on disability is likewise affirmed.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

GARY SUDOL
12222 MERIT DRIVE
DALLAS, TEXAS 75251.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Veronica Lopez
Appeals Judge