

APPEAL NO. 031559
FILED AUGUST 6, 2003

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 June 4, 2003. The hearing officer resolved the disputed issues by deciding: (1) that (alleged employer) (d/b/a alleged employer) was not the appellant's (claimant) employer for purposes of the 1989 Act; (2) that the claimant's _____, injury is not compensable because he was not an employee of (alleged employer); (3) that because the claimant did not have a compensable injury, the claimant did not have disability; (4) that the respondent (carrier) did not waive its right to contest the claim under Section 409.021; and (5) that the carrier waived the right to contest whether the claimant sustained a compensable injury because it did not specifically raise that issue as required under Section 409.022. The claimant appealed the hearing officer's employer, injury, disability, and carrier waiver under Section 409.021 determinations. The appeal file does not contain a response from the carrier.

DECISION

Affirmed, on other grounds.

It is undisputed that (alleged employer) was doing business as _____, a janitorial franchise. (Alleged employer) carried workers' compensation insurance coverage. On May 7, 2002, Mr. W purchased from (alleged employer) a janitorial franchise. On May 14, 2002, Mr. W attempted to sell his franchise to Mr. J; however, the sale of the franchise was never transferred or completed. During the interim of the transfer between Mr. W and Mr. J, Mr. J hired the claimant to perform janitorial duties at various facilities. The claimant sustained an injury to his neck, back, and left knee on _____, while in the course and scope of employment. Mr. J testified that it was his belief that he was a franchise owner, although the transfer of the franchise was not completed at the time the claimant sustained an injury, and that he considered the claimant to be his employee.

At issue in this case is whether (alleged employer) was the employer for purposes of the 1989 Act. The hearing officer's determination that (alleged employer) was not the claimant's employer for purposes of the 1989 Act involved a question of fact for the hearing officer to resolve. See Texas Workers' Compensation Commission Appeal No. 013127, decided January 25, 2002; and Texas Workers' Compensation Commission Appeal No. 020608, decided May 1, 2002. The hearing officer is the sole judge of the weight and credibility of the evidence and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. Section 410.165(a). The hearing officer determined that Mr. J was the employer for purposes of the 1989 Act, and that Mr. J did not have workers' compensation insurance coverage. In view of the evidence presented, we cannot conclude that the hearing officer's determination is 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).

With regard to carrier waiver, the issue was whether the carrier was liable for benefits given that the carrier's insured, (alleged employer), was not the employer on the date of the claimant's injury. A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in evidence reflects that the carrier first received written notice of the claimed injury on September 30, 2002, and agreed to pay benefits as they accrued on October 1, 2002, in accordance with Section 409.021. A second TWCC-21 in evidence dated October 8, 2002, reflects that the "[c]arrier disputes claim as claimant was not employed by the Insured at the time of the alleged incident. Since claimant was not an employee he would not be entitled to workers compensation benefits under statute," in accordance with Section 409.021(c). Given that the hearing officer found: (1) that on _____, the claimant was an employee of Mr. J, employer; (2) that Mr. J did not have workers' compensation insurance coverage; (3) that the carrier received written notice of the claim on September 30, 2002, and on October 3, 2002, the carrier filed with the Texas Workers' Compensation Commission a TWCC-21 agreeing to pay benefits as they accrued; and (4) that the carrier filed a TWCC-21 on October 9, 2002, contesting compensability of the claimed injury solely on the basis that the claimant was not an employee of (alleged employer), the hearing officer's conclusion of law that the carrier did not waive its right to contest the claim under Section 409.021 is sufficiently supported by the evidence.

The hearing officer commented:

This employment issue is an issue of compensability, not coverage. If Claimant had been an employee, his injury would have been covered by workers' compensation insurance. Coverage falls outside of the ambit [sic] compensability when the issue is whether the employer has a viable Workers' Compensation insurance contract not when, as here, the issue is whether Claimant is an employee of the alleged employer that has Workers' Compensation insurance coverage.

We disagree with the hearing officer's comments and discussion that this case was an issue of compensability, rather than coverage, given his determination that the claimant was not an employee of the "alleged employer," (alleged employer). The Appeals Panel has held that where the claimant is determined not to be an employee of the insured on the date of injury, as in this case, the carrier cannot be held liable for the claimed injuries under the waiver provision of Section 409.021, as a matter of law. Texas Workers' Compensation Commission Appeal No. 022268-s, decided October 30, 2002, citing Houston General Insurance Co. v. Association Casualty Insurance Co., 977 S.W.2d 634 (Tex. App.-Tyler 1998, no pet. h.) (holding that a carrier cannot waive into coverage for a person not employed by its insured on the date of injury for failing to observe the timely defense provisions of Section 409.021). Texas Workers' Compensation Commission Appeal No. 030746, decided May 7, 2003. Coverage is a threshold requirement for establishing liability of a carrier. Appeal No. 022268-s; Texas Workers' Compensation Commission Appeal No. 960500, decided April 19, 1996.

Nevertheless, the hearing officer's determination that the carrier did not waive its right to contest compensability is affirmed, albeit on other grounds.

The determination that the carrier waived the right to contest the compensability of the claimed injury because it did not specifically raise that issue as required under Section 409.022(a) was not appealed, and it will not be addressed in this decision, as it has become final under Section 410.169.

Given our affirmance regarding the identity of the employer as Mr. J, rather than (alleged employer), we affirm the hearing officer's determination that the claimant's _____, injury is not compensable because he was not an employee of (alleged employer), and that because the claimant did not have a compensable injury, the claimant did not have disability. Cain, *supra*.

We affirm the hearing officer's decision and order on other grounds.

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

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Veronica Lopez-Ruberto
Appeals Judge

CONCUR:

Edward Vilano
Appeals Judge

CONCUR IN THE RESULT:

I would have simply affirmed the hearing officer's decision.

Thomas A. Knapp
Appeals Judge