

APPEAL NO. 031950
FILED SEPTEMBER 8, 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 was scheduled for April 15, 2003, but was held on June 11, 2003. The hearing officer determined that (company 1), (Bank), or (company 2) was not the decedent's employer for purposes of the 1989 Act at the time of the claimed injury; that since the decedent was not an employee, the respondents (carrier 1 and carrier 2) have not waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022; that the decedent did not suffer a compensable injury on _____, which resulted in his death; that if the decedent did sustain a compensable injury, carrier 1 and carrier 2 are not relieved from liability under Section 409.002 because timely notice was given pursuant to Section 409.001; that if the injury is compensable, the claim is barred under Section 409.007 because of the appellant decedent's spouse's (claimant beneficiary) failure to timely file a claim for death benefits with the Texas Workers' Compensation Commission (Commission); that if the injury is compensable, the claim is not barred under 409.007 because the decedent's minor children timely filed a claim for death benefits with the Commission as required by Section 409.007; that the beneficiaries are not barred from pursuing Texas workers' compensation benefits because of an election of remedies that precludes recovery of such benefits; that MM, PM, and/or LM are the proper beneficiaries of the decedent; and that at the time of the claimed injury, company 2 Inc. was not covered by the Staff Leasing Act pursuant to Section 91.001.

The claimant beneficiary appealed, asserting that the hearing officer erred in determining that company 1, the Bank, and company 2 were not the decedent's employers for purposes of the 1989 Act at the time of the injury; that carrier 2 has not waived the right to contest compensability of the claimed injury due to its failure to timely contest the injury in accordance with Sections 409.021 and 409.022; that the decedent did not sustain a compensable injury resulting in his death; that the decedent's spouse is barred from pursuing her claim because she failed to timely file a claim under the provisions of Sections 409.007 and 409.008; and that COMPANY 2 was not covered under the Staff Leasing Act. Both carrier 1 and carrier 2 responded, urging affirmance.

DECISION

Affirmed as reformed.

The hearing officer did not err in finding that the decedent was not an employee of company 1, the Bank, or company 2 for purposes of the 1989 Act. The claimant beneficiary contends that the hearing officer erred in determining that the decedent was an independent contractor rather than an employee. The applicable law in this regard is discussed in Texas Workers' Compensation Commission Appeal No. 950075, decided

February 28, 1995, and Texas Workers' Compensation Commission Appeal No. 000105, decided March 8, 2000. Whether an injured worker was an "employee" or an independent contractor is a question of fact, determined in part by considering right to control. Goodnight v. Zurich Insurance Co., 416 S.W.2d 626 (Tex. Civ. App.-Dallas 1967, writ ref'd n.r.e.). As the Appeals Panel noted in Texas Workers' Compensation Commission Appeal No. 91115, decided January 29, 1992, the 1989 Act (Section 401.012) defines "employee" as each person in the service of another under a contract of hire, express or implied, oral or written, but not including an independent contractor or employee of an independent contractor, who is engaged in construction, remodeling, or repair work for employer at the premises of the employer.

Sections 406.121(1), (2), and (5) define, respectively, a general contractor, an independent contractor, and a subcontractor. The Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 93110, decided March 26, 1993, that whether an individual is an employee or an independent contractor depends upon "whether the purported employer has the right to control the individual in the details of the work to be performed. [Citation omitted.]" This decision went on to state that "[w]here no contract between the parties establishes the employer's right to control the work, the employee-employer relationship may be established circumstantially by evidence of actual exercise of control. [Citation omitted.]" We noted that, in many respects, the 1989 Act's definition of independent contractor incorporates the common-law factors the courts have looked to in analyzing one party's right to control the details of another's work. We stated that such factors may include the independent nature of the worker's business; the worker's obligation to furnish the necessary tools, supplies, and materials to perform the job; the worker's right to control the progress of the work, except as to the final results; the time for which the worker is employed; the method of payment; whether the worker could come and go; whether income taxes were withheld; and whether the work required special skill. We further stated that it does not appear that each and every evidentiary factor in the statutory definition need be present and that each controversy involving whether an injured worker is an employee or independent contractor must be decided on its own particular facts and that, ordinarily, "no one feature of the relationship between the worker and the employer is determinative. [Citation omitted.]" Whether a claimant or decedent is an independent contractor or employee is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 991200, decided July 22, 1999. We have reviewed the evidence and the hearing officer's determinations, and we conclude that her determinations are 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); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). The hearing officer's finding that the decedent was not an employee of the above-named companies clearly supported her determination of no coverage by carrier 1 or carrier 2 and that the claimant beneficiary was not entitled to benefits from either carrier.

The claimant beneficiary additionally argues that carrier 2 has waived the right to contest the claim pursuant to the Texas Supreme Court's decision in Continental

Casualty Company v. Downs, 81 S.W.2d 803 (Tex. 2002). The status of being an employee of an insured for which a carrier is liable is an issue of “coverage,” not compensability. Texas Workers’ Compensation Commission Appeal No. 022268-s, decided October 30, 2002. “Coverage” is a threshold requirement for establishing liability of a carrier. Appeal No. 022268-s, *supra*; Texas Workers’ Compensation Commission Appeal No. 960500, decided April 19, 1996. Where the claimant or decedent 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. Appeal No. 022268-s, 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, by failing to observe the timely defense provisions of Section 409.021); Appeal No. 960500, *supra*. Accordingly, the hearing officer’s treatment of the waiver issue is not reversible error.

The hearing officer did not err in determining that the decedent did not sustain a compensable injury. The claimant beneficiary’s challenge to the injury determinations is premised upon the success of her argument with regard to the decedent’s employment status. Because we have affirmed the hearing officer’s determination that there is no coverage in this case, we likewise affirm the hearing officer’s injury determination. Given our affirmance of the hearing officer’s determination that the decedent was an independent contractor, we decline to address the remaining appealed issues regarding timely filing of a claim and the Staff Leasing Act.

We strike Finding of Fact No. 11 as it is clear from the context that it is not applicable to the instant case.

The hearing officer’s decision and order are affirmed as reformed.

The true corporate name of insurance carrier 1 is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.**

The true corporate name of insurance carrier 2 is **LIBERTY MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Edward Vilano
Appeals Judge