APPEAL NO. 950400

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 in (city), Texas, on June 17, 1994, with (hearing officer) presiding as hearing officer, to determine whether (Company A) was the appellant's (claimant) employer for purposes of the 1989 Act, whether Company A was a subscriber to workers' compensation insurance on (date of injury), and to determine claimant's average weekly wage (AWW). The hearing officer signed a Decision and Order on February 15, 1995, in which she found, among other things, that claimant's work was controlled by persons employed by (Company B) and concluded that Company A was not claimant's employer for purposes of the 1989 Act. The hearing officer also concluded that claimant's AWW was $560.00 and that Company A was a subscriber to workers' compensation insurance on (date of injury), and those determinations have not been appealed. Regarding the identity of the employer issue, claimant asserts that the hearing officer erred in determining that Company A was not his employer for purposes of the 1989 Act, that in the alternative and pursuant to Section 406.124 he should be treated as an employee of Company A for purposes of the 1989 Act because the evidence sufficiently establishes Company A's intent to avoid liability, and that the burden of proof regarding borrowed servant was wrongly placed on him because the three corporate entities involved in this case were "companion businesses." Claimant further asserts error in the hearing officer's delay of nearly eight months in issuing the decision, contending that such delay was unfair and tended to make his case appear minimal and insignificant thus reducing the effectiveness of any appeals. The respondent (carrier) asserts that the evidence is sufficient to affirm the hearing officer's determination of the employer issue; that the intent of Company A to avoid liability under Section 406.124 was not a disputed issue before the hearing officer and is raised for the first time on appeal; that even if the Section 406.124 issue be deemed a subsumed issue, the evidence does not support a finding by the Appeals Panel that Company A intended to avoid liability; and that the burden of proof concerning borrowed servant was correctly placed on claimant and his failure to object to such burden at the hearing waived the issue. The carrier declined to take a position on the hearing officer's delay in issuing her decision describing the matter as a complaint regarding Texas Workers' Compensation Commission (Commission) procedure.

DECISION

Finding no reversible error, we affirm.

In evidence were carrier's responses to claimant's interrogatories. Two responses stated that Company A's workers' compensation insurance policy did not cover masonry employees and that Company A had neither masonry employees nor insurance coverage for masonry employees. Another response stated that claimant was, first, an employee of Company B; that on the date of his injury he was an employee of (Company C); and that he was never an employee of Company A. Another response stated that (Mr. HHS), (Mr. JE), (Mr. PM) and (Mr. HHJ), were the "incorporators, officers and directors" of Company A; that

Mr. HHJ was the incorporator, officer and director of Company B; and that Mr. HHS was the incorporator, officer and director of Company C. The Articles of Incorporation for Company A, however, showed that Mr. PM was the sole incorporator and director of Company A.

Claimant's testimony and other evidence indicated that he was employed as a brick and stone mason at a (store project) during the approximate period from (date) through (date of injury), the date he injured his neck and back picking up heavy stones. Claimant testified that all but the last of his weekly paychecks were written on Company B checks and delivered to him at the job site by his foreman, (Mr. LW); and that his last paycheck was written on a Company C check which he picked up from the secretary at Company B's office sometime after his injury. In evidence were Company B payroll records on claimant for periods between "[date]" and "[date]" and one record from Company C which showed payment for eight hours with the date scratched out.

(Ms. KB), who testified that she worked, apparently as the secretary, for Company A and part time for Company C, stated that claimant never worked for Company A. She said he came to the office on the Thursday or Friday after his injury and picked up the Company C check, and that the check was payment for only the eight hours he worked on the date of his injury since that day was the first day of the pay period as well as his last day of work. When asked why claimant's last check was written by Company C when his previous checks for that job were written by Company B, Ms. KB explained that claimant worked for Company C "at that time" because as Company B would approach the end of a job it would "give the employees over to" Company C and recommend them for hiring rather than laying them off. She said the job claimant worked on ended soon after he was injured, that in December some other Company B employees were also transferred to Company C, and that by January all were with Company C.

Mr. LW testified that he worked at the store project for Company B for approximately four months during the August-(month year) period; that he had no written contract with Companies A, B, or C; that he was "the foreman" who hired his own crew, including claimant, for the job; that he normally collected the employees' checks at Company B's office and distributed them at the job site; and that his paychecks and those of his crew were issued by Company B. He conceded he paid scant attention to the details of the checks but rather focused on whether they cleared "for me and my guys," and that while it was "possible" some checks were written by Company C, he had since looked at some of his paystubs and they were all written by Company B. He also said he did not know or care whether he was controlled by Company A or Company B, that he knew nothing of the "office status," and that his primary concern was getting the job done and his crew paid. He said that he had previously performed other jobs for Company B, that the practice was that Mr. HHJ or Mr. JE would have him into the office (apparently the common address of both Company A and Company B), review the job plans and specifications, and then tell him to "go do it;" that they "would just hand me the plans and say `take care of it.'" He said he "ran the job," hired his

own crew consisting of scaffold men, operators, bricklayers, and saw men, and controlled their hours. He further stated that he had hired claimant to do masonry work at the store project for Company B and he determined claimant's pay. As for equipment, he said the bricklayers used their own equipment for bricklaying; that the forklifts, saws and mixers came from Company B or a rental company; and that he took charge of the equipment provided by either Company B or a rental company. He did not mention who provided the scaffolding. He said he had very little discussion of the details of the job with Company B since the job "went smoothly."

Mr. LW further indicated that it was he who determined the number of employees and the skills the job required, that he had approximately 20 employees at the store project, and that as the job neared its end he reduced the number of personnel stating "that's the general policy of my company." He also stated that he had worked for three companies, including Company B, over the past four years, and that after completing the work at the job site for Company B he went to work for (Company D), a company for whom he had previously done masonry work. He initially testified that he did not go to work for Company C at the end of the store project. He later said that he noticed a payroll change as the store project ended and that while the payroll could have changed to Company C he was unaware of it. Mr. LW testified that it was he who laid off claimant. Testifying again later in the hearing and responding to hearing officer questions Mr. LW said that on some date in (month year) which he could not recall, he worked for Company C and that on claimant's injury date he worked for Company C.

Mr. HHJ testified that Company B entered into a subcontract with Company C on March 1, 1993, before the Articles of Incorporation for Company C were filed on March 3, 1993. The parties did not litigate the validity of the contract. He said he did not know the identity of the board of directors of Company C but assumed they included his father, Mr. HHS. In a prior statement given to (Ms. DG), an adjuster, on February 21, 1994, Mr. HHJ stated the following: "He was an employee for [Company B] but we sometimes subcontract labor through [Company C] where we take certain employees probably I don't know exactly how it is figured out, Jimmy [presumably Mr. JE] and I both handle this deal where we take employees and we in turn subcontract through my father, [Mr. HHS] and [Company C], [Company C] employees." Mr. HHJ did not testify to Company B's having a contractor-subcontractor relationship with Company A on the store project.

Ms. DG testified that on October 1, 1993, the carrier issued a rider adding masonry workers to the coverage provided to Company A and that on December 2, 1993, that coverage was deleted. She indicated that the rider had issued as a result of a "misunderstanding." Carrier's interrogatory responses indicated that the carrier had erroneously thought that Company A had employees who were masons. In evidence was a November 24, 1993, letter from Mr. HHS to the carrier stating that he was "a general

contractor who obtains the jobs and requires certificates from the companies performing the work and that his office is "just clerical operations."

Mr. HHS testified that after retiring from (Company E) he was rehired on a contract basis to write manuals for the OSHA certifications of production and maintenance personnel; that while so engaged he realized that to perform jobs at certain plants, contractors, including his son, HHJ, were required to have OSHA certified personnel such as scaffold workers; and that he got the idea of acquiring a workforce of OSHA certified personnel who could be sent to contract jobs. He said that Company C provided Company A with masonry personnel and that about 45% of Company C's contracts were with Company A and the remainder with other contractors. In evidence was a "Sub-Contract Agreement" made on March 1, 1993, by and between Company A as the "contractor" (signed by Mr. JE) and Company C as the "subcontractor" (signed by Mr. HHS), which provided that it was a "blanket contract" by which the subcontractor agreed to provide all labor necessary to complete jobs on "an as needed basis." It referred to an attached TWCC-85 (Agreement Between General Contractor and Subcontractor To Establish Independent Relationship) dated March 1, 1993. This latter document also stated that it was a "blanket agreement" and identified the general contractor as Company A (signed by Mr. JE) and the subcontractor as Company C (signed by Mr. HHS). It was not clear from the evidence whether Company A was the general contractor for the store project. Some responses of Mr. HHS to the hearing officers' questions seemed to suggest the possibility. Nor was there evidence of a contractor-subcontractor/ independent contractor relationship between Company A and Company B for that project. Mr. HHS testified that the "blanket agreement" contract was the only written contract between the three companies that he was aware of, that there was no written contract between Company A and Company B, and that he knew "very little" about Company B.

Mr. HHS also testified that in late 1993 some Company B employees were released and hired by Company C including Mr. W and claimant, and that on (date of injury), claimant was an employee of Company C. No information was provided as to how or when claimant's change in employment was accomplished. He did state that the employees were given directions by Mr. LW and that Mr. LW had hired them. Mr. HHS also stated that he and his secretary, Ms. KB, were the only board members of Company C and that he had not previously met claimant. He also stated, variously, that he had received an application from claimant but did not know when, and that he "personally probably did not" see an application from claimant, indicating that Ms. KB handled all the paperwork. He identified the subcontract between Company A and Company C in evidence and said he had no knowledge of any subcontract between Company A and Company B.

The elucidation of claimant's theory of his case was not a model of clarity. Claimant argued to the hearing officer that on the date of injury he was an employee of Company B; that there had been a "bait and switch" (apparently referring to claimant's transfer to

Company C); that on the date of his injury claimant was a borrowed servant of Company A; that claimant should be deemed a borrowed servant of Company A because the subcontract was between Company A and Company C and not with Company B; and that on the injury date Company A had workers' compensation insurance coverage for masonry workers. In his appeal claimant further posits that he became the borrowed servant of Company A because Company A "retained control over the job site." In support of such contention claimant asserts that Mr. HHJ was an officer of both Company A and Company B, that Mr. JE was an officer in Company A, that Mr. HHJ and Mr. JE reviewed the job specifications with them, that Mr. HHJ and Mr. JE supervised Mr. LW, and that MR. LW attended foremen meetings at the common address of Company A and Company B. Claimant summarizes the involvement of the three companies as a "corporate shell game." It was not clear from the evidence or argument whether claimant was taking the position that he was the borrowed servant of Company A throughout the period of time he worked on the store project because Company A was the general contractor and "controlled the job site," or that he became the borrowed servant of Company A on the date of his injury when he was ostensibly transferred to Company C pursuant to the March 1, 1993, blanket agreement and Company A controlled the job site. The carrier contended that neither Mr. LW nor claimant were employees of Company A and argued, alternatively, that on the date of his injury claimant was the employee of either Company B or Company C but in no event the employee of Company A.

Pertinent to the appealed employer issue the hearing officer found that on or about (date of injury), claimant "was injured while working as a masonry worker on a project which had been subcontracted to [Company B]," that his work was controlled by persons employed by Company B, and that he was paid by Company B. Based on these findings the hearing officer concluded that Company A was not claimant's employer for purposes of the 1989 Act. The hearing officer is the sole judge of the materiality, relevance, weight and credibility of the evidence. Section 410.165(a). It is for the hearing officer to resolve the conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). As an appellate reviewing body we will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The only evidence relating to the nature of the store project was the carrier's response to an interrogatory which identified the project as the store project. Since there was no evidence as to whether the store project exceeded three stories in height or 20,000 square feet, we cannot tell whether the definitions in and provisions of Subchapter G (Coverage of Certain Building and Construction Workers) apply. If the definitions in and provisions of Subchapter G were not implicated because of the size of the store project, then the definitions in and provisions of Subchapter F (Coverage of Certain Independent Contractors), the broader statute, would apply. Each statutory provision contains its own

definition of "independent contractor." Section 406.121 defines "general contractor," "independent contractor," and "subcontractor," and Section 406.141 defines "hiring contractor" and "independent contractor." We discussed these two subchapters (then Article 8308-3.05 and Article 8308-3.06) in Texas Workers' Compensation Commission Appeal No. 91115, decided January 29, 1992, describing them as "two specific statutes that set forth agreements that persons operating as `contractors' may execute to clarify their understanding of the relationship vis-a-vis workers' compensation insurance coverage, or to extend coverage to non-employees." In that case, the Appeals Panel felt compelled, "because of gaps in the evidence," to remand for further development of the evidence as to the size of the project and the relationship between the injured employee and the insured company so that it could be determined which statute applied.

We do not find in the record evidence of the identity of the general contractor for the store project at the job site if it was not Company B, as the hearing officer's first finding implies. While there was the scant testimony of Mr. HHS that Company A had only a few employees and was a general contractor who obtained jobs and subcontracted out the work, the record was not developed as to whether Company A was the general contractor for the store project and subcontracted some or all of the work to Company B. As noted, the March 1, 1993, "blanket agreement" was between Company A and Company C and it appears to be this contract that claimant relies on to place Company A in the posture of the borrowing or special employer. If the parties and the hearing officer somehow knew that Company A, not Company B, was the general contractor for the store project, such was not developed in the evidence of record. We also note that no findings were made as to whether either Company B or Mr. LW were independent contractors or as to whether claimant was the employee of an independent contractor. As noted, both Section 406.121(2) and Section 406.141(2) define "independent contractor," depending on which statute applies.

Claimant's appeal does not complain of the lack of findings concerning the size of the project, the identity of the general contractor, the identity of any subcontractors and independent contractors, and whether claimant was the employee of an independent contractor. Rather, claimant's appeal, as did his argument below, focuses on his contention that he became the borrowed servant of Company A, the only one of the entities involved shown to have workers' compensation insurance coverage. Accordingly, in contrast to the situation obtaining in Appeal No. 91115, *supra*, we do not find it necessary to remand this case for further development of the evidence and additional findings.

We are satisfied that the evidence sufficiently supports the finding that claimant's work was controlled by Company B, that he was paid by Company B, and the conclusion that Company A was not his employer. The evidence clearly establishes that Mr. LW was hired by Company B on the store project at the job site, apparently to perform the masonry work; that at the outset the plans and specifications of the job were reviewed with Mr. LW and thereafter the details of his work and that of his crew were not controlled by Company

B; that Mr. LW hired his own crew including claimant, set their hours, supervised their work, and saw to it that they were paid weekly by Company B; and that it was Mr. LW who laid off claimant. There was no evidence that claimant was employed by Company A directly. While there was some evidence of claimant's having been transferred to Company C on or about the date of his injury, with whom Company A had the March 1, 1993, "blanket agreement," there was no evidence that Company A exercised the right to control the details of claimant's work and thereby became the borrowing employer. In an early case, the Appeals Panel reversed the decision of the hearing officer and concluded as a matter of law that the injured employee, hired by an independent contractor, had not become the borrowed servant and thus the employee of the general contractor because of the lack of evidence showing acts of control of the injured employee by the general contractor. Texas Workers' Compensation Commission Appeal No. 91005, decided August 14, 1991. Texas Workers' Compensation Commission Appeal No. 94140, decided March 18, 1994, is cited by the claimant. In that case, the Appeals Panel, citing various Texas cases, noted the doctrine that an employee of a general employer may become the borrowed servant of another, that such is a question of fact, that the borrowed servant doctrine protects the employer who had the right of control over the manner of and details of the employee's work from common-law liability, that the general supervision a general contractor exercises over a subcontractor to see that the work is done in accordance with a contract does not constitute evidence of an employer-employee relationship, and that to determine whether an injured worker has become a borrowed servant, the question is which company has the right to control the activities of the servant. *See also* Texas Workers' Compensation Commission Appeal No. 94358, decided May 11, 1994, and Texas Workers' Compensation Commission Appeal No. 941698, decided February 2, 1995.

In another assigned error claimant argues that this case involved a "corporate shell game" and that because Companies A, B, and C were "companion businesses" the borrowed servant burden of proof was wrongly placed on him. As the carrier notes in its response, claimant did not object to and made no mention of having a problem with the burden of proof at the hearing when the hearing officer advised the parties that claimant had the burden to prove he was entitled to the relief he sought. Claimant cites us to Dodd v. Twin City Fire Insurance Company, 545 S.W.2d 766 (Tex. 1977). In Dodd, the injured worker, who was employed by a phosphate company which had workers' compensation insurance, was directed during a shift to go to an adjacent fertilizer company (uninsured), owned by the same six people who owned the phosphate company, to perform a task, and was injured performing that task. The carrier asserted as a defense to the employee's claim that at the time of his injury the employee was not the employee of the phosphate company but rather had become the borrowed servant of the fertilizer company. The court's opinion stated that the burden of proof was on the carrier to prove as a matter of law that the employee had ceased to be an employee of the phosphate company and was the borrowed servant and under the control of the fertilizer company when he was injured. We view claimant's citation as inapt because the carrier in Dodd, having asserted the borrowed

servant defense, quite obviously acquired the burden of proof. *See* Texas Workers' Compensation Commission Appeal No. 94397, decided May 13, 1994. We find this appealed issue lacking in merit.

Claimant further asserts that Section 406.124 dictates that he should be treated as the employee of Company A because the evidence establishes an intent to avoid liability. That section provides that 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, an employee of the subcontractor who sustains a compensable injury shall be treated as an employee of the person for workers' compensation purposes and shall have a separate right of action against the subcontractor. The carrier asserts that this issue is not properly before the Appeals Panel in that claimant has first raised it at this level. In the alternative, the carrier points to the absence of evidence showing an intent by Company A to avoid liability. We agree with the carrier that because this issue was not raised below we are not required to decide it. As we have previously stated concerning issues not raised at the hearing, "[s]ince the issue was never brought before the contested case hearing, there is no decision of the hearing officer on which to base a proper predicate for review of this matter by the Appeals Panel." Texas Workers' Compensation Commission Appeal No 91057, decided December 2, 1991.

We turn now to the remaining appealed issue concerning the untimeliness of the issuance of the hearing officer's decision and order. The record shows that the hearing was convened and adjourned on June 17, 1994, and that the hearing officer signed the decision on February 15, 1995, nearly eight months later. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(c) (Rule 142.16(c)) provides that no later than the 10th day after the close of the hearing, the hearing officer shall file the decision with the Texas Workers' Compensation Commission (Commission) division of hearings. *And see* Section 410.168(c). The Commission's records indicate that the decision was filed with the hearings division on February 17, 1995. The record provides no indication of the reason for the delay. While the hearing officer's unexplained delay of nearly eight months in issuing the decision falls drastically short of compliance with Rule 142.16(c), we do not find authority in the 1989 Act to take remedial action. Claimant asserts, in essence, that the delay is "unfair" and has had the effect of trivializing his case on appeal. While we could hardly maintain, absent some explanation, that such inordinate delay is fair, we cannot agree with claimant's unsupported assertion that his case has in some sense been devalued for purposes of appeal. In Texas Workers' Compensation Commission Appeal No. 950142, decided March 14, 1995, the Appeals Panel stated:

> As for the failure of the hearing officer to file her decision in 10 days as provided for in Rule 142.16(c), the Appeals Panel has previously held that such time limits are not mandatory. Texas Workers' Compensation Commission Appeal No.92456, decided October 8, 1992.

In Texas Workers' Compensation Commission Appeal No. 950200, decided March 23, 1995, we observed that "hearing officers should strive to avoid lengthy lapses of time, which can work a hardship on either party." Compare our decision in Texas Workers' Compensation Commission Appeal No.950381, decided April 25, 1995, where we found that disability was not shown to have continued from November 28, 1994, the last date any evidence was brought into the record, until February 1, 1995, the date the hearing officer stated the record was closed.

Finding sufficient evidentiary support for the dispositive findings and the absence of prejudicial error, we affirm the hearing officer's decision and order.

Philip F. O'Neill
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge