APPEAL NO. 950433

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 January 12, 1995, with (hearing officer) presiding as hearing officer, to consider two disputed issues, namely, whether the respondent (claimant) sustained a compensable injury on or about (date of injury), and whether he gave timely notice of such injury to his employer. The hearing officer found that claimant was injured while working for (Employer A) on or about (date of injury), and concluded that he sustained a compensable injury on or about that date. That finding and conclusion have not been appealed. With respect to the timely notice to the employer issue, the hearing officer found that on (date of injury), claimant "told his supervisor that he had sustained an injury while working on that date" and concluded that claimant "did report an injury to the employer on or about the 30th day after the date of the injury." The appellant (carrier) asserts on appeal that claimant reported his injury to an employee of a subcontractor to whom claimant had been temporarily loaned and not to any supervisor or manager of his employer and thus that there is no evidence and insufficient evidence to support the dispositive finding and conclusion on the timely notice of injury issue. The carrier further posits that this appeal presents the Appeals Panel with a question of law, to wit: "Does a report of injury by a worker to a subcontractor of an employer and not to the employer constitute notice to the employer as envisioned by the Act." The claimant filed no response.

DECISION

Reversed and remanded.

At the outset of the hearing, the hearing officer proposed that the parties stipulate to certain facts including the fact that on or about (date of injury), the claimant was employed by Employer A and the following exchange took place.

Hearing Officer:Can the parties stipulate to those facts? [Claimant]?

Claimant: Uh, I was working for [Employer A].

Hearing Officer:On the day of your claimed injury?

Claimant: On the day of the injury, I was working for [Employer A] but they had a contractor that they, uh . . .

Hearing Officer:Okay, but was uh, [Employer A] your employer on the date of your claimed injury?

Claimant: Yes.

As can be seen, when queried about agreeing to the proposed stipulation as to his employer claimant attempted to indicate that another potential employer was involved but was cut off in mid sentence. Further, in his closing argument claimant made reference to having been a borrowed servant at the time of his injury. Under these circumstances, we cannot say that the unrepresented claimant agreed that Employer A was his employer at the time of his injury and therefore we do not regard that stipulation as valid.

Claimant testified that he had worked for Employer A off and on for about two and one-half years; that his supervisor with Employer A was (Mr. TF); that on the morning of his accident he was directed by Mr. TF to go to a job site where [Employer B], a subcontractor of Employer A, was performing work; that later that day when he stepped off the front-end loader he was operating at that job site, he twisted his left knee; that he reported his injury that day to (Mr. BH) who was Employer B's supervisor at that job site and with whom he had been working; that he also told a fellow employee of Employer A, (Mr. DS), who was similarly working at the Employer B job site, about his injury; that he continued to work in pain; and that he did not know whether Mr. BH reported the injury to Mr. TF. In evidence was a transcription of a telephone interview of claimant on June 14, 1994, during which claimant stated that the accident happened between three and four o'clock in the afternoon in mid-(month year), that the pain later abated, that as he continued to work his knee began to bother him increasingly so that he went to a doctor on his own, and that he discussed the injury with (Mr. KB), Employer A's general manager and safety director, around the first of June 1994. According to claimant, when he talked to Mr. KB in June about his injury and about obtaining medical treatment Mr. KB responded that he did not know whether claimant had injured his knee on or off the job and thus that he could not send him to a company doctor or do anything else about the injury.

Claimant further testified that Employer A paid Employer B as a subcontractor, apparently for asphalt work on Employer A's construction project; that whenever Employer B needed additional help he would obtain workers from other jobs; that when claimant went to Employer B's job site on the morning of his injury it was Mr. BH who told him what to do; that he worked under the direction of Mr. BH the entire day; and that he was paid by Employer A. He further stated that in his experience, injured employees reported their injuries to the supervisor they were working for and that he felt he should report the injury to Mr. BH because he was working for him at the time of the accident. The evidence was not developed as to the ownership of the front-end loader he was operating.

Mr. KB, who said he handled Employer A's workers' compensation claims, testified that claimant called him on June 1, 1994, advising that he had twisted his knee several months earlier and stating that he had reported the injury to Mr. BH. Mr. KB said he advised claimant that he should have told Mr. TF or Employer A's project superintendent, (Mr. RJ), about the accident and that he was outside the 30-day period for reporting an injury. *See* Section 409.001. Mr. KB further testified that he investigated claimant's reported injury; that he spoke to Mr. TF and Mr. RJ and neither had knowledge of the injury; that Employer B was a subcontractor of Employer A; that on the day of claimant's injury Employer B was

short of personnel to complete the parking lot part of the project and requested personnel from Employer A who could be spared; that Employer A told Mr. TF "to round up a few and get them to [Employer B] to try to get him caught up;" and that Mr. TF told claimant "to go and do whatever was needed by [Employer B]." He also said that Mr. BH was the operating foreman for Employer B and was on that job site on the date of claimant's injury and that Mr. TF was not on the job site.

In his argument claimant advised the hearing officer that he felt he was "a borrowed servant" who reported his injury to the person who gave him his orders and instructions on what he was to do. The carrier's argument stated: "Here it looks like [claimant] gave timely notice but the, the operative question is did he give timely notice to the employer. And the carrier argues that he did not. He gave notice to an employee of a subcontractor of the employer . . . " The dispositive findings and conclusion in question are as follows.

FINDINGS OF FACT

4.The Claimant was injured while working for [Employer A] on or about (date of injury).

5.On (date of injury), the Claimant told his supervisor that he had sustained an injury while working on that date.

CONCLUSION OF LAW

3.The Claimant did report an injury to the employer on or about the 30th day after the date of the injury.

The findings that claimant was working for Employer A when injured and that on that date he reported the injury to "his supervisor" are problematical since the evidence is clear that claimant reported the injury to Mr. BH and that Mr. BH was employed by Employer B. Mr. BH could not be said to have been claimant's supervisor at that time unless claimant, too, was the employee of Employer B at that time. As can be seen, these findings and the conclusion do not address whether claimant had become the borrowed servant of Employer B when he was injured.

The hearing officer's Decision and Order contain no discussion whatsoever and thus no insight into her analysis and rationale in resolving this disputed issue. The hearing officer gave no indication that she recognized that a borrowed servant issue was raised by the evidence and was subsumed in the timely notice issue, despite the fact that it was advanced by claimant in his argument. *See generally* Texas Workers' Compensation Commission Appeal No. 91005, decided August 14, 1991; Texas Workers' Compensation Commission Appeal No. 94358, decided May 11, 1994; and Texas Workers' Compensation Commission Appeal No. Appeal No. 941698, decided February 2, 1995, concerning the borrowed servant doctrine. Obviously, to resolve whether an injured employee has given

timely notice of an injury to his or her employer, the identity of the employer, if in question, must be resolved as a threshold matter. The failure to provide any indication of the hearing officer's analysis and rationale in reaching these findings is singularly unhelpful in appellate review. For the above reasons, we reverse the decision and order of the hearing officer and remand this case for such further development of the evidence and for such further findings and conclusions as may be appropriate. The hearing officer should consider providing notice of the remand hearing not only to Employer A and the carrier but also to Employer B and its workers' compensation carrier, if any, since the hearing officer's consideration of the borrowed servant issue would obviously implicate the potential liability of Employer B for this claim.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge