APPEAL NO. 991111

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 14, 1999, a contested case hearing (CCH) was held. The issues concerned the claim of the injured worker and respondent (claimant), for injuries he sustained while working as a roofer on _____. The stated issue was whether the appellant/cross-respondent, (D Company), or (G Company) was the employer for purposes of the 1989 Act at the time of the injury. Additional issues were added, to wit, whether D Company, which asserted a dispute to compensability under the Employers Bill of Rights (Section 409.011), exercised due diligence in disputing the claim, and whether the respondent/cross-appellant (carrier) was a party to the proceeding. The claimant did not appear and could not be located at the last address known to the Texas Workers' Compensation Commission (Commission). The compensability of the claim was argued by the carrier, which had accepted liability for benefits on or about July 3, 1996. D Company was the carrier's insured at the time of the injury.

The hearing officer determined that the carrier was properly before the Commission as a party to the CCH. The hearing officer further determined that D Company had not acted with reasonable diligence in disputing compensability because D Company knew about the acceptance of liability by the carrier as of July 3, 1996, and of the ability to dispute compensability, but did not act to dispute compensability until April 4, 1997. Nevertheless, the hearing officer went on to adjudicate the merits of the claim, finding that D Company and G Company were in fact the same company, with G Company being formed as an alter-ego of D Company in order to avoid workers' compensation coverage for the roofing crews. He found that the claimant was injured in the course and scope of his employment and had sustained "a compensable injury." However, the hearing officer also found that the claimant was an independent contractor of G Company (and therefore D Company) on the date of his injury.

The carrier and D Company have appealed. D Company continues to assert that the carrier is not a proper party to the proceeding. It further appealed all findings relating to its relationship with G Company and the determination that it did not act with due diligence to dispute compensability. The carrier has appealed the determination made by the hearing officer that the claimant was an independent contractor and not an employee of D Company, and raises for the first time on appeal a question about D Company's standing, arguing that when the sole basis of defense raised at the CCH is the contention that it is not an "employer," it does not have recourse to the Employer's Bill of Rights. D Company responds in essence that the lack of employer status is a matter that may validly be raised under the Employer's Bill of Rights. The response ends with a prayer that the decision of the hearing officer be upheld. There is no appeal of the conclusion of law that the claimant sustained a "compensable injury."

DECISION

Affirmed in part, reversed and rendered in part.

We shall first address the presence of the carrier in this proceeding. It was undisputed that the carrier accepted liability for the claim at a July 3, 1996, benefit review conference (BRC) at which officers for D Company were also present. The carrier executed an agreement at the BRC. At the CCH appealed here, the carrier's position on compensability of the injury had not changed. D Company objected to the party status and involvement of the carrier at the hearing and was overruled by the hearing officer. The hearing officer determined that the carrier was a party because it was ultimately liable for benefits and therefore had a direct legal interest in the outcome. It does not appear from arguments and the hearing officer's decision that it was argued that the Appeals Panel had already addressed the issue in Texas Workers' Compensation Commission Appeal No. 93886, decided November 15, 1993. The Appeals Panel held in that decision that the carrier, who had also been present at the CCH and who filed an appeal, was not a party under the same definition applied by the hearing officer here (as set forth in TEX. W.C. Comm'n, 28 TEX. ADMIN. CODE § 140.1 (Rule 140.1)). We therefore agree that the hearing officer erred by considering the carrier a "party" to the CCH, and we likewise do not consider its appeal filed herein. We reverse the hearing officer's findings and conclusions that the carrier was a "party" to the CCH.

Because we agree, however, that the hearing officer properly found that D Company failed to exercise due diligence in filing a dispute to the claim, we will only briefly go into the facts of the case, since the hearing officer's findings on other matters become essentially "advisory opinions" on matters involving the status of the claimant with respect to either D Company or G Company and do not affect liability for the claim which had been established by agreement of the carrier.

The claimant, who could not be located and whose whereabouts were unknown, injured his back on _____, while performing roofing services on a residential roof. The evidence showed that he was on the payroll of G Company, whose accountant also represented, for income tax purposes, that he was an employee. Claimant had completed a W-4 form and there were no bids or other contracts produced that showed a written subcontract agreement with G Company. There was, however, an application for employment with G Company that had been completed by claimant.

Claimant was also described as an "employee" for purposes of an accident policy that was held by G Company on its employees. It was asserted by officers of D Company and G Company, in an injury lawsuit brought by another worker for injuries he sustained, that claimant was an "employee" of G Company. By contrast, it was asserted by Mr. D, who was an officer and employee of D Company, and by Mr. P, the general manager of D Company, that claimant was an independent contractor/ subcontractor, that he was a crew chief, that he was paid "by the square" referring to square footage of the project (albeit in weekly checks from G Company), and that crew chiefs generally "hired" their own

crews. The circumstances for payment of the crew were left somewhat unclear in the testimony. It was agreed that a crew was directly paid by G Company, at the direction of crew chiefs, and were paid by the "square," but it was not established if this amount was taken from the overall amount paid to crew chiefs or in addition to that payment.

Mr. M, another crew chief, testified that he considered himself an independent contractor. He equated claimant's status to his. He said that roofers were free to work for other companies, although D Company would not like it. He said that out of a show of loyalty to D Company, he would only work weekends for other companies.

Mr. P testified that G Company was formed after the 1989 workers' compensation law went into effect. He agreed that the purpose was to form an additional insulation against liability for injuries that would be claimed against D Company. He said that Mr. D and Mr. W were involved in the meeting to set up G Company and that Mr. W was made the nominal president. Mr. D had essentially no recollection of the events or dates of G Company being set up. Mr. P testified in a deposition that G Company had no offices, no assets, and that D Company employees performed some of the responsibilities of G Company. He said that he exercised financial oversight over G Company to "make sure they were a viable entity." Letters sent to prospective customers by Mr. P in 1995 stated that D Company carried "appropriate" or "necessary" workers' compensation insurance.

Mr. P said that the accident policy purchased by G Company for subcontractors was represented to him to cover anyone working on projects and that he was later surprised to discover that the policy, by its terms, would extend only to G Company "employees." However, monthly premium forms were sent to the accident insurance company by G Company and show that in January 1995 claimant was listed as an employee. Mr. P said that anything prepared by the accountant for G Company that described subcontractors as "employees" for Internal Revenue Service purposes was done under different definitions of employee; however, no copies of these definitions were put into evidence, nor was the hearing officer asked to take official notice of any provisions of the Internal Revenue Code.

Mr. P said that the July 10, 1996, testimony in deposition of his wife (another officer) in connection with a lawsuit, describing Mr. M as an employee of G Company, was done without much thought being given at that time to the relationship or the ramifications. Mr. P said that he used the terms "employee" and "subcontractor" and "independent contractor" interchangeably for some purposes.

Mr. D said that D Company provided materials for roofing but not tools, which were provided by the roofers themselves. He said that D Company inspected for defects and directed necessary repairs, and hired roofers by directing them to apply at G Company.

There was also evidence that the carrier and D Company are involved in litigation in County, Texas, and there was a deposition from Ms. W, former general secretary for D Company, put in evidence. She testified as to the formation of G Company and the fact

that she performed many functions for that company. Ms. W testified that Agreements for Certain Building and Construction Workers (TWCC-83) forms were signed by the roofers at a meeting with Mr. D and Mr. P, and explained the forms to them with translation provided by Mr. M. Ms. W testified to her understanding that roofers had to report every day to Mr. D and that they would be punished if they went to work for other roofing companies by not getting any more work from D or G Company. She said that they were free to set their own hours, however.

The carrier's adjuster, Ms. WH, testified that the carrier originally disputed the claim on the basis that the claimant was not an employee of its insured but that she determined at the July 3, 1996, BRC that the carrier would accept liability. She said that claimant, Mr. D, and Mr. P were in attendance and her conclusion was based on information furnished by all of them. She said she informed Mr. P of this and told him at the same time that he could continue a dispute under the Employer's Bill of Rights. She said that Mr. P told her he would not dispute.

Mr. P said that he was never told by Ms. WH that he had the right to dispute, although she "alluded" to it. He said that he continued to make several phone calls to the carrier about this decision to accept liability and that he finally called the Commission, found out about his right to dispute, and did so immediately, in a document that was filed April 4, 1997. This dispute describes G Company as the "employer" of claimant, as does his attorney's request for a BRC filed May 14, 1998. Mr. P said that after he filed his dispute, he thought things would happen automatically so did not request a BRC at that time. Mr. P said that the Commission never sent him information informing him of his right to dispute. He agreed that he filed the dispute after the carrier sought to charge D Company additional premiums for workers' compensation insurance. The BRC agreement was not signed by Mr. P or Mr. D, and states agreement that claimant was an employee of D Company for workers' compensation purposes.

Claimant's transcribed statement, given to the carrier's adjuster on April 3 and 4, 1996, is in evidence. He said he worked for D Company but was subsequently told that "both companies" were together so that he was then working for G Company. He said he did not have jobs with other roofing companies. He said he was paid by the house, which came out to about $500.00 a week. He said that Mr. D gave him orders about where he was to work. He said that the tools were purchased by D Company, but that roofers bought the tools by deductions from their paychecks. The claimant said he was like an employee, not a contractor. He said that if he were going to leave early, he would have to report that to the company. He said that if there was a lot of work to do, they would get upset if roofers left early. He said he did not sign any papers saying that he was a contractor.

Although the hearing officer's determination that claimant was an independent contractor is somewhat called into question by the weight of the evidence, we will not address this because it has not been appealed by a party properly before the CCH and on appeal. The matter of standing of D Company to invoke the Employers Bill of Rights was also not raised as an issue at the CCH and we will not address it for the first time on

appeal. We find support in the record for the other appealed findings in the case involving the relationship between D Company and G Company, as well as the hearing officer's determination that D Company did not use due diligence to dispute compensability. The requirement to exercise "reasonable diligence" was first set forth in Texas Workers' Compensation Commission Appeal No. 92280, decided August 13, 1992, and cited in Texas Workers' Compensation Commission Appeal No. 931017, decided December 20, 1993 (two-year wait not reasonable), and Texas Workers' Compensation Commission Appeal No. 961088, decided July 24, 1996 (seven and one-half months wait not reasonable).

For the reasons stated above, we reverse the hearing officer's determination that the carrier was a party to the CCH and render a decision that it was not, and cannot therefore appeal that decision. In all other respects on the appealed issues, we affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge