APPEAL NO. 101718
FILED MARCH 21, 2011

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 October 11, 2010.

The issues before the hearing officer were:

1. Was (Employer 1), (Employer 2), (Employer 3)[1], or (Employer 4), respondent 1's (claimant) employer for purposes of the 1989 Act?

2. Did appellant, Texas Mutual Insurance Company (TMC/Carrier C), respondent 2, Texas Mutual Insurance Company (TMC/Carrier A), respondent 3, Zurich American Insurance Company (Zurich/Carrier B), or respondent 4, American Guarantee and Liability Insurance Company (AG&L/Carrier D) provide workers' compensation insurance for Employer 1, Employer 2, Employer 3, or Employer 4 on (date of injury)? (issue as modified by consent of all parties)

3. Did the claimant sustain a compensable injury on (date of injury)?

4. Did the claimant have disability resulting from an injury sustained on (date of injury), and if so, for what period(s)?

The hearing officer determined that: (1) on (date of injury), the claimant was the employee of Employer 1, Employer 2, and Employer 3 but was not the employee of Employer 4 for purposes of the 1989 Act; (2) TMC/Carrier C provided workers' compensation insurance for Employer 2 and Employer 3 on (date of injury); (3) TMC/Carrier A did not provide workers' compensation for Employer 1 on (date of injury); (4) AG&L/Carrier D did not provide workers' compensation insurance for either Employer 1, Employer 2, Employer 3, or Employer 4 on (date of injury); (5) Zurich/Carrier B provided workers' compensation insurance for Employer 4 on (date of injury); (6) the claimant sustained a compensable injury on (date of injury); and (7) the claimant had disability beginning on August 22, 2009, and continuing through the date of the CCH, October 11, 2010.

TMC/Carrier C appealed the hearing officer's determinations; however, it specifically contended that because the claimant was not an "assigned employee" under the Staff Leasing Services Act (SLSA), the claimant was not covered by Employer 3's workers' compensation policy, and that the claimant was not a borrowed servant of Employer 2. AG&L/Carrier D responded, urging affirmance of the hearing officer's determination that AG&L/Carrier D did not provide workers' compensation insurance coverage for any entity in this claim or any liability in this case. The appeal file does not contain a response from the claimant, TMC/Carrier A, or Zurich/Carrier B to

[1] Employer 3 is also known as (name).

TMC/Carrier C's appeal. The hearing officer's order to dismiss AG&L/Carrier D from the case has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

FACTUAL SUMMARY

The claimant testified that she was injured at work when she fell through a hole in the floor while cleaning at the (jobsite) on (date of injury). The claimant testified that she was hired and paid by Employer 1, which did Employer 1 hanging. The evidence reflects that the claimant was sent by Employer 1 to do general cleaning at the (jobsite).

The evidence reflects the following relationships between entities on the (jobsite):

1. Employer 4 was the general contractor for the (jobsite);

2. Employer 4 contracted with Employer 2 as an independent contractor to provide services on the project which included drywall hanging;

3. Employer 3 was the license holder under SLSA and contracted with Employer 2, the client company, to provide human resource (HR) services and workers' compensation insurance to the "Staff" of Employer 2 on the (jobsite).

4. By agreement with Employer 2, Employer 3 did not provide workers' compensation insurance for any Employer 2 employee other than those defined as "Staff." Employer 2 understood that it would be responsible for providing workers' compensation insurance for any employees other than "Staff."

5. Employer 2 "Staff" is defined within the contract between Employer 2 and Employer 3 as meaning "those identified by [Employer 2] as employees subject to this Agreement, reported to Employer 3 in writing, and for whom [Employer 2] has reported payroll and supplied the other data required by Employer. Persons who have not been identified to Employer 3 as Staff are not subject to this Agreement. Staff are 'assigned employees' within the meaning of Texas Labor Code 91.001(2)."

6. Employer 2 contracted with Employer 1 for temporary workers for the (jobsite).

EMPLOYMENT RELATIONSHIPS AND COVERAGE

EMPLOYER 1 AND TMC/CARRIER A

That portion of the hearing officer's determination that on (date of injury), the claimant was the employee of Employer 1 is supported by sufficient evidence and is affirmed.

The hearing officer's determination that TMC/Carrier A did not provide workers' compensation insurance for Employer 1, on (date of injury), is supported by sufficient evidence and is affirmed.[2]

EMPLOYER 4 AND ZURICH/CARRIER B

The hearing officer's determination that Zurich/Carrier B provided workers' compensation insurance for Employer 4 on (date of injury), is supported by sufficient evidence and is affirmed.

The hearing officer's determination that on (date of injury), the claimant was not the employee of Employer 4 is supported by sufficient evidence and is affirmed.

EMPLOYER 2 AND EMPLOYER 3 AND TMC/CARRIER C

The hearing officer's determination that TMC/Carrier C provided workers' compensation insurance for Employer 2 and Employer 3 on (date of injury), is supported by sufficient evidence and is affirmed.

(TY), the vice-president of Employer 2, testified that Employer 2 contracted with Employer 1 to provide temporary workers for the (jobsite), which was a big job lasting at least a year. TY testified that the hiring of Employer 1's employees was to supplement Employer 2's employees for this project because they did not have enough people to do all the work.

In evidence is the Subcontract Agreement dated November 14, 2008, between Employer 4, the general contractor, and Employer 2, the independent contractor. Employer 2 agreed in pertinent part with Employer 4 that:

> Employer 2 would furnish all materials, labor, construction equipment, tools, supplies, and/or services to furnish the work and shall carry out all obligations, duties, and responsibilities imposed on Employer 2 by the Agreement Documents.

[2] In the Background Information section of the decision and order, the hearing officer stated: "Records show that [Employer 1] obtained workers' compensation insurance from [TMC/Carrier A] and that such insurance was properly terminated as of February 16, 2009."

> Employer 2 shall provide and maintain, during the term of this Agreement . . . occurrence-based insurance with coverages and limits of liability . . . . Employer 2 shall require each Subcontractor to provide and maintain, during the term of their respective agreements . . . the insurance coverages specified.
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> Required Coverage includes workers' compensation.
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> Employer 2 and its Subcontractors shall be independent contractors with respect to the Work, and neither Employer 2 nor its Subcontractors, nor any person employed by any of them shall be deemed to be Employer 4's employees, servants, representatives or agents in any respect.

In evidence is the Customer Service Agreement between Employer 2 and Employer 3, signed on January 21, 2009, and on February 3, 2009, respectively. That agreement specifically provides in pertinent part that:

> 1. Employer 3 agrees to provide [Employer 2] with the HR support services identified under this Agreement, solely with respect to those employees identified in writing by [Employer 2] to Employer 3 as Staff under the terms of this Agreement. Employer 3 assumes only those responsibilities toward the Staff as specifically required under this Agreement or which are required under Chapter 91 of the Texas Labor Code. In all other respects, [Employer 2] shall continue to have full and sole responsibility with respect to the Staff and with respect to the operation of its business.
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> 6. (a) [Employer 2] is solely responsible for locating, recruiting, evaluating and screening all persons that [Employer 2] intends to designate as Staff under this Agreement. Persons hired by [Employer 2] will become Staff subject to this Agreement only upon [Employer 2's] submission of a completed Employer 3 new employee packet and the assignment of an employee number by Employer 3. Persons hired by [Employer 2] but not disclosed to Employer 3 by [Employer 2] are not Staff under this Agreement, and Employer 3 shall have no responsibility of any kind as to such persons. [Employer 2] understands that only Staff properly identified to Employer 3 under this Agreement will be covered by Employer 3's workers' compensation insurance.
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> * * * *

> 8. (e) [Employer 2] shall maintain a policy of standard workers' compensation insurance in order to cover all employees of [Employer 2], other than Staff covered by this Agreement . . . . [Employer 2] understands that Employer 3's workers' compensation insurance will not provide any coverage with respect to any of [Employer 2's] contractors or subcontractors. [Employer 2] shall ensure that all of its contractors or subcontractors hold workers' compensation in compliance with state law. [Employer 2] shall obtain a certificate of insurance from each contractor or subcontractor . . . .

The evidence reflects that Employer 1 furnished to Employer 2 a Certificate of Liability Insurance for workers' compensation coverage provided by TMC/Carrier A for its employees at the (jobsite). Also in evidence is a Notice of Cancellation reflecting that said policy, effective from October 9, 2008, through October 9, 2009, was cancelled effective February 16, 2009. TY testified that he was unaware that Employer 1 no longer had workers' compensation insurance coverage for the claimant's injuries until after her date of injury on (date of injury), and that he was misled by Employer 1 as to workers' compensation insurance coverage.

(AS), the Director of Risk Management for Employer 3, testified that the workers' compensation insurance coverage through TMC/Carrier C did not cover any employees hired by Employer 2 and undisclosed to Employer 3. AS testified that the claimant was not an employee of Employer 2 or of Employer 3. There is no evidence that the claimant completed the new employee packet required by Employer 3 or that Employer 3 issued the claimant a new employee number as set out under the terms of the Agreement with Employer 2 such that the claimant would be identified as "Staff" or an "assigned employee" of Employer 2. AS testified that Employer 2 and Employer 3 would be considered co-employers only as to disclosed employees of Employer 2 and such co-employees would be covered by TMC/Carrier C.

The claimant testified that she reported to the jobsite at (jobsite) and was provided tools to use and directions as to where to work at the jobsite by two foremen employed by Employer 2. Employer 2's foremen, Johnny and Miguel, daily supervised at the jobsite the Employer 1 crew's work of which her cleaning was an integral part of her crew's drywall hanging. Testimony from TY reflected that although Employer 1 initially paid its employees, Employer 2 began paying Employer 1 employees directly after concerns about Employer 1 paying its employees.

The identity of the employer for purpose of workers' compensation was at issue in this case. The starting point in our analysis is the definition of "Employer" under Section 401.011(18). "Employer" means, unless otherwise specified, "a person who makes a contract of hire, employs one or more employees, and has workers' compensation insurance coverage. The term includes a governmental entity that self-insures, either individually or collectively." Section 401.011(44) defines "Workers' compensation insurance coverage" to mean: "(A) an approved insurance policy to secure the payment of compensation; (B) coverage to secure the payment of

compensation through self-insurance as provided by this subtitle; or (C) coverage provided by a governmental entity to secure the payment of compensation." The exclusive remedy provision of the 1989 Act says, "Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee." *See* Section 408.001(a). But if an employer, i.e., "a person who employs one or more employees," elects not to obtain workers' compensation insurance, that employer is subject to common-law negligence claims and may not assert certain defenses, including contributory negligence, assumed risk, or that the injury or death was caused by a fellow employee. *See* Section 406.033.

We note that in Texas Workers' Compensation Insurance Fund v. Del Industrial, Inc., 35 S.W.3d 591 (Tex. 2000), the insurance carrier for Del Industrial was attempting to collect premiums to cover not only workers directly employed by Del Industrial but the employees leased to Del Industrial by a staff leasing company. The staff leasing company had elected not to provide workers' compensation coverage for the employees leased to Del Industrial. The court stated that the insurance carrier in that case contended that the "coemployer" language in subsection (c) means that Del Industrial, the client company, is the "coemployer" of the leased employees for workers' compensation purposes such that the leased workers were covered by Del Industrial's workers' compensation policy. The court went on to say that interpretation of "coemployer" ignores the context in which the word is used and is contrary to the express statutory scheme developed by the Texas Legislature. The court further stated that because the Legislature immediately followed the term "coemployers" with an explicit explanation of the consequences of the staff leasing company's election, it held that the staff leasing company and the client company are "coemployers" only to the extent of the staff leasing company's election. The court stated that the SLSA, Texas Labor Code Chapter 91, statutorily supercedes the common-law right-of-control test in determining employer status of leased employees for workers' compensation purposes.

Under SLSA, Labor Code Chapter 91, Section 91.001(2) defines "Assigned employee" to mean "an employee under a staff leasing services arrangement whose work is performed in this state. The term does not include an employee hired to support or supplement a client company's work force in a special work situation, including: (A) an employee absence; (B) a temporary skill shortage; (C) a seasonal workload; or (D) a special assignment or project.

Section 91.001(14) also defines "Staff leasing services" to mean:

> an arrangement by which employees of a license holder are assigned to work at a client company and in which employment responsibilities are in fact shared by the license holder and the client company, the employee's assignment is intended to be of a long-term or continuing nature, rather than temporary or seasonal in nature, and a majority of the work force at a client company worksite or a specialized group within that work force

> consists of assigned employees of the license holder. The term includes professional employer organization services. The term does not include: (A) temporary help; (B) an independent contractor; (C) the provision of services that otherwise meet the definition of "staff leasing services" by one person solely to other persons who are related to the service provider by common ownership; or (D) a temporary common worker employer as defined by Chapter 92.
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> Section 91.001(16) defines "Temporary help" to mean:
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> an arrangement by which an organization hires its own employees and assigns them to a client to support or supplement the client's work force in a special work situation, including: (A) an employee absence; (B) a temporary skill shortage; (C) a seasonal workload; or (D) a special assignment or project.

We must analyze whether the claimant under the facts of this case is covered as an "assigned employee" under the workers' compensation insurance coverage by TMC/Carrier C as provided by the agreement between Employer 2 and Employer 3 under SLSA, Labor Code Chapter 91. The evidence reflects that the claimant was a temporary worker furnished by Employer 1 to Employer 2 in order to supplement its workforce on a special project. Section 91.001(16). The testimony of TY, the vice-president of Employer 2, reflects that Employer 2 and Employer 1 had an agreement that Employer 1 was to provide workers' compensation insurance for its employees, which included the claimant, on the (jobsite), and that Employer 2 did not know that the workers' compensation insurance coverage provided by TMC/Carrier A was cancelled effective February 16, 2009. There is no evidence that Employer 2 provided workers' compensation insurance coverage for any temporary workers on the (jobsite). The evidence reflects that the claimant is not an employee of Employer 2 or of Employer 3 based on the terms of the agreements in evidence as discussed between Employer 2 and Employer 3 and by the testimony of TY and AS, the Director of Risk Management for Employer 3. Accordingly, we hold that on (date of injury), the claimant was not an assigned employee for which workers' compensation insurance coverage was provided by TMC/Carrier C for Employer 2 and Employer 3. Further, because Employer 1's workers' compensation insurance coverage was cancelled by TMC/Carrier A effective on February 16, 2009, prior to the date of the claimant's work injury on (date of injury), the claimant had no "employer" that provided workers' compensation insurance coverage for the claimant's work injury for purposes of the 1989 Act.

Therefore, the hearing officer erred as a matter of law in finding that the claimant was an employee of Employer 3and/or Employer 2 under a theory of coemployers under SLSA or under a theory that Employer 2 was an "employer" for the purposes of the 1989 Act providing workers' compensation insurance coverage for the claimant, a temporary worker provided by Employer 1. That portion of the hearing officer's determination that on (date of injury), the claimant was the employee of Employer 2 and of Employer 3 for purposes of the 1989 Act is reversed and a new decision rendered

that on (date of injury), the claimant was not the employee of Employer 2 or of Employer 3 for purposes of the 1989 Act.

COMPENSABILITY AND DISABILITY

Section 401.011(10) defines "[c]ompensable injury" to mean "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle [the 1989 Act]." To be eligible for benefits under the Act, the injured worker must have been an employee of an employer that carries workers' compensation insurance coverage at the time the work-related injury occurred. Section 406.031. Section 401.011(16) defines "[d]isability" to mean "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage."

Given that we have affirmed that portion of the hearing officer's determination that the claimant was the employee of Employer 1, which did not carry workers' compensation insurance coverage at the time the claimant's work-related injury occurred on (date of injury), and reversed that portion of the hearing officer's determination that the claimant was the employee of Employer 2 and of Employer 3 on (date of injury), and rendered a new decision that the claimant was not an employee of Employer 2 or of Employer 3 on (date of injury), we hold that the claimant was not an employee of an employer that was a subscriber to workers' compensation insurance on (date of injury). Therefore, we reverse the hearing officer's determination that the claimant sustained a compensable injury on (date of injury), and render a new decision that the claimant did not sustain a compensable injury on (date of injury). We further reverse the hearing officer's determination that the claimant had disability beginning on August 22, 2009, and continuing through the date of the CCH, October 11, 2010, and we render a new decision that the claimant did not have disability because there is no compensable injury on (date of injury).

SUMMARY

We affirm the hearing officer's determination that on (date of injury), the claimant was the employee of Employer 1.

We affirm the hearing officer's determination that TMC/Carrier A did not provide workers' compensation insurance for Employer 1, on (date of injury).

We affirm the hearing officer's determination that on (date of injury), the claimant was not the employee of Employer 4.

We affirm the hearing officer's determination that Zurich/Carrier B provided workers' compensation insurance for Employer 4 on (date of injury).

We affirm the hearing officer's decision that TMC/Carrier C provided workers' compensation insurance for Employer 2 and Employer 3 on (date of injury).

We reverse that portion of the hearing officer's decision that on (date of injury), the claimant was the employee of Employer 2 and of Employer 3 for the purposes of the 1989 Act and we render a new decision that on (date of injury), the claimant was not the employee of Employer 2 or of Employer 3 for the purposes of the 1989 Act.

We reverse the hearing officer's determination that the claimant sustained a compensable injury on (date of injury), and we render a new decision that the claimant did not sustain a compensable injury on (date of injury).

We reverse the hearing officer's determination that the claimant had disability beginning on August 22, 2009, and continuing through the date of the CCH, October 11, 2010, and we render a new decision that the claimant did not have disability because there is no compensable injury on (date of injury).

The true corporate name of TMC/Carrier A is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

The true corporate name of Zurich/Carrier B is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

The true corporate name of TMC/Carrier C is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.

The true corporate name of AG&L/Carrier D is **AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

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Cynthia A. Brown
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Carisa Space-Beam
Appeals Judge