APPEAL NO. 110180
FILED APRIL 19, 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 28, 2010.

The issues before the hearing officer were the following:

1. Is respondent 2 (carrier L) or appellant (carrier A) liable for respondent 1's (claimant) injury sustained on _____?

2. Was (Employer 1) or (Employer 2) the claimant's employer for purposes of the 1989 Act at the time of the claimed injury?

3. Is the carrier relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation with the Texas Department of Insurance, Division of Workers' Compensation (Division), within one year of the injury, as required by Section 409.003?

4. Has carrier L waived its right to contest that the claimant was an employee of Employer 1, pursuant to Section 409.021? *(added for good cause at the request of carrier A)*

The hearing officer determined the following:

1. Carrier A, the carrier for Employer 2 is liable for the claimant's injury sustained on _____;

2. Employer 2 was the claimant's employer for purposes of the 1989 Act at the time of the claimed injury;

3. Carrier L and carrier A are not relieved from liability under Section 409.004; and

4. Carrier L has not waived its right to contest that the claimant was an employee of Employer 1, pursuant to Section 409.021.

Carrier A appealed the hearing officer's determinations that: (1) Employer 2 was the claimant's employer for purposes of the 1989 Act at the time of the claimed injury; (2) carrier A, the carrier for Employer 2, was liable for the claimant's injury sustained on _____; (3) carrier A is not relieved from liability under Section 409.004; and (4) carrier L has not waived its right to contest that the claimant was an employee of Employer 1, pursuant to Section 409.021.

Carrier L responded, urging affirmance and arguing that carrier A's appeal was not timely. The appeal file does not contain a response from the claimant.

The hearing officer's determination that carrier L is not relieved from liability under Section 409.004 has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that the claimant sustained serious injuries when he fell 20 to 30 feet from a roof at work at the Employer 2 facility on _____.

TIMELY APPEAL

Carrier A's appeal is timely and carrier L's response that the appeal is untimely is without merit based upon a review of the Division records and the date of service of the hearing officer's decision and order by the Division to carrier A and to the attorney representing carrier A at their correct addresses.

EMPLOYER

The claimant testified that Employer 1 hired him in September of 2006 and assigned him to work at Employer 2 as an industrial maintenance mechanic to work on pumps and valves, replace pipes, weld and do preventive maintenance. The evidence reflects that Employer 1 is a provider of temporary workers and not a staff leasing agency. The claimant further testified that Employer 1 employees would visit the Employer 2 facility each week to deliver payroll and to check on their assigned workers; however, the claimant also stated that he received daily work assignments from Employer 2 maintenance supervisors, and that on the date of injury, _____, a Employer 2 supervisor had directed him as well as the entire maintenance department, to work on the roof, removing panels to allow access by a crane inside the Employer 2 facility.

The claimant's testimony was consistent with and supported by the testimony of (DJR), a manager for Employer 1. DJR stated that he considered the claimant as an employee of Employer 1 on the date of injury as well as a co-employee of Employer 2 because Employer 2 had assigned the claimant to work outside the scope of the duties for which Employer 1 had assigned the claimant to with Employer 2, namely: to work on machinery and equipment within the plant to keep it functioning to continue to make styrofoam cups rather than to work as a general laborer on the roof. DJR also testified that while Employer 2 could fire the claimant from their work site, only Employer 1 could fire the claimant as an employee of Employer 1. DJR also stated that Employer 2's maintenance managers had control over the claimant's work at the Employer 2 facility. There is no evidence of a written or oral agreement between Employer 1 and Employer

2 regarding workers' compensation insurance coverage for Employer 1 temporary workers assigned to Employer 2.

The identity of the employer for the purpose of workers' compensation was at issue in this case. In Wingfoot Enters. v. Alvarado, 111 S.W.3d 134 (Tex. 2003), the Texas Supreme Court held that there may be two employers for workers' compensation purposes when a provider of temporary workers furnishes a worker to a client that controlled the details of the work at the time the worker was injured and there was no agreement between the provider of temporary workers and the client regarding workers' compensation coverage. The Texas Supreme Court also held that "[a]n employee injured while working under the direct supervision of a client company is conducting the business of both the general employer and that employer's client. The employee should be able to pursue workers' compensation benefits from either." *See also* Appeals Panel Decision 061764-s, decided October 31, 2006.

That portion of the hearing officer's decision that Employer 2 is the claimant's employer for purposes of the 1989 Act at the time of the claimed injury is supported by sufficient evidence and is affirmed.

Because there is sufficient evidence to support the hearing officer's determination that at the time of the claimant's injury on _____, he was performing the duties of a maintenance mechanic assigned by Employer 1, a temporary agency, to Employer 2, the client, accordingly the claimant at the time of his injury was conducting the business of Employer 1, the general employer, and Employer 2, the employer's client. Additionally, there is no evidence of an agreement regarding workers' compensation coverage between Employer 1 and Employer 2. Therefore, that portion of the hearing officer's employer-employee decision that did not include a conclusion of law or decision regarding whether Employer 1 is the claimant's co-employer for purposes of the 1989 Act at the time of the claimed injury is reversed as incomplete and a new decision rendered that Employer 1 is the claimant's co-employer for purposes of the 1989 Act at the time of the claimed injury.

FAILURE TO TIMELY FILE CLAIM FOR COMPENSATION UNDER SECTION 409.004 AS TO CARRIER A

The hearing officer's decision that carrier A is not relieved from liability under Section 409.004 is supported by sufficient evidence and is affirmed.

SECTION 409.021 AS TO CARRIER L

Section 409.021(a) provides that for claims based on a compensable injury that occurred on or after September 1, 2003, that not later than the 15th day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall: (1) begin the payment of benefits as required by the 1989 Act; or (2) notify the Division and the employee in writing of its refusal to pay. Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before

the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability.

Carrier L, the insurance carrier for Employer 1, did not contend either at the CCH, or on appeal, that it contested the compensability of the claimant's injury within the 60-day period. In the Background Information of the decision, the hearing officer stated:

> This [h]earing [o]fficer performed a review of the Division's [Dispute Resolution Information System] [n]otes, Texas Compass Claim Forms List, and TXCOMP file on the claimant's _____, date of injury. That review shows that [Employer 1] filed its First Report of Injury on March 20, 2007. ([Hearing Officer's Exhibit Nos. 4 and 5]). It also shows that [carrier L] initiated benefits upon receiving notice of the injury, and that [carrier L] did not contest the claim within the 60-day period to dispute. In fact, the Division's records show that the carrier paid benefits for over two years. Those benefits included impairment income benefits. To date, there is still no PLN dispute of the claim from [carrier L], in the Division's records.

In addition, there is an unappealed Finding of Fact No. 8 which in pertinent part states that neither carrier L nor its insured employer, Employer 1, contested the claim within the 60-day period to dispute. Rather carrier L argued at the CCH and on appeal that it found evidence that could not have reasonably been discovered earlier which would allow it to reopen the issue of compensability pursuant to Section 409.021(d).

DJR, the manager for Employer 1, for which the insurance carrier is carrier L, testified that Employer 1 does not assign workers to do "roofing jobs or anything like that because of the risk" and that he was not aware that the claimant was performing such duties and that the claimant was injured because of a fall from "a high height" until "shortly after the injury occurred based on the investigation of the injury actually happening," either on or a few days after _____. DJR further testified that he reported the facts of the claimant's fall to carrier L, and that to his knowledge carrier L never disputed or denied that this was not a compensable injury. Rather, carrier L paid income and medical benefits to the claimant over the last three years. DJR testified that he had advised carrier L that he felt that Employer 2 could have co-employer responsibility and "they needed to pursue subrogation from day one."

The evidence reflects that carrier L reasonably could have discovered that the claimant's injury on _____, allegedly occurred while the claimant was performing work outside the scope of his assigned duties, at the direction of Employer 2, in order to dispute compensability.[1] Accordingly, we reverse the hearing officer's

[1] We note that in the Background Information section of the decision and order, the hearing officer discusses that a carrier cannot waive into coverage and that who the correct employer is involves a question of coverage. The hearing officer bases his determination on carrier waiver under Section 409.021 on this concept. This is legal error. In Moralez v. Liberty Mutual Ins., 241 S.W.3d 514 (Tex.

decision that carrier L has not waived its right to contest that the claimant was an employee of Employer 1, pursuant to Section 409.021 and render a new decision that carrier L has waived its right to contest that the claimant was an employee of Employer 1, pursuant to Section 409.021.

CARRIER LIABILITY

That portion of the hearing officer's decision that carrier A, the carrier for Employer 2, is liable for the claimant's injury sustained on _____, is supported by sufficient evidence and is affirmed.

Given that we have rendered a new decision that Employer 1 is the claimant's co-employer for purposes of the 1989 Act at the time of the claimed injury, that portion of the hearing officer's decision on carrier liability that did not include a conclusion of law or decision regarding whether carrier L, the insurance carrier for Employer 1, was liable for the claimant's injury sustained on _____, is reversed as incomplete and a new decision rendered that carrier L is liable for the claimant's injury sustained on _____.

SUMMARY

We affirm that portion of the hearing officer's determination that Employer 2 is the claimant's employer for purposes of the 1989 Act at the time of the claimed injury.

We affirm that portion of the hearing officer's determination that carrier A, the carrier for Employer 2, is liable for the claimant's injury sustained on _____.

We affirm the hearing officer's determination that carrier A is not relieved from liability under Section 409.004.

We reverse that portion of the hearing officer's determination on the identity of the claimant's employer at the time of the claimed injury as incomplete regarding Employer 1 and render a new decision that Employer 1 was the claimant's co-employer for purposes of the 1989 Act at the time of the claimed injury.

We reverse that portion of the hearing officer's determination on carrier liability regarding carrier L as incomplete and render a new decision that carrier L, the insurance carrier for Employer 1, is liable for the claimant's injury sustained on _____.

We reverse the hearing officer's determination that carrier L has not waived its right to contest that the claimant was an employee of Employer 1, pursuant to Section 409.021 and render a new decision that carrier L has waived its right to contest that the claimant was an employee of Employer 1, pursuant to Section 409.021.

2007) the Texas Supreme Court held that employee status is a question of compensability and is not a coverage issue.

The true corporate name of insurance carrier A is **AMERICAN HOME ASSURANCE 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 insurance carrier L is **LIBERTY MUTUAL FIRE 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.

_____
Cynthia A. Brown
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge