APPEAL NO. 92134
FILED MAY 20, 1992

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act). TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On February 27, 1992, after being continued from November 7, 1991, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. He found that on (date of injury), claimant, respondent herein, was an employee of (employer) and ordered benefits be provided. Appellant asserts that respondent is an independent contractor, that this decision conflicts with other state agency determinations, that the decision is unconstitutional, and that there was no issue before the hearing officer upon which he could determine that benefits were due.

DECISION

Finding that the contract in this case did control the question of whether an employer/employee relationship existed, we reverse and render.

Respondent, on 22 June 1990, signed an "Independent Contractor Contract" (ICC) with employer to make deliveries which employer would have arranged with third parties. Employer would represent to such third party that a delivery would be made within a certain time period. A higher rate for faster service was charged. By terms of the ICC, respondent provided his own vehicle in which to make deliveries, provided ancillary equipment (dollies), and was paid a percentage of the amount employer received for each delivery. The ICC recites that respondent had the exclusive right to control the manner of conducting deliveries for employer, that employer would deduct no taxes, that respondent could provide services for others at the time he was under contract to employer, and that respondent could employ employees. The ICC had a term of one year but could be terminated earlier for reasons specified therein. A clause also specified that an independent contractor relationship was created.

Facts concerning the activities of respondent from evidence outside the ICC included: respondent wore a "uniform," respondent was told at what time to report to begin the day's work, respondent was required to keep a daily log, make entries on invoices, and fill out a driver's form. He was given a specific time period in which to perform each delivery but was not told which of several due at the same time to do first, and respondent went through a short training program. Respondent testified that at the time of the injury he was assigned to make deliveries for one third party (he was "dedicated" to make deliveries required by [company]) and that when he was through with their deliveries for the day, he was to radio employer to report such completion and to be assigned to pick up additional matter from third parties. Appellant's evidence indicated that respondent did not have to accept added jobs and could cease performing at any time during the day with no untoward results other than no more commissions would be paid for that period.

Respondent and employer parted company on March 15th, according to carrier exhibit D, which is styled, "Contract Driver Termination Report." It comments that

respondent used a company purchase order to obtain gas for his vehicle. We note that this form includes the legend, "Rehire? yes____ no_/___." The form is signed by a person whose signature is not completely clear, but whose initials are D.T. A man named (DT) testified for the appellant saying that he was driver services manager for the employer and described routes, paperwork required by employer, and assignments. He said a driver could refuse to do a particular delivery but would then go to the "bottom of the list" to wait until he came up again. He signs the ICC for employer and discusses the relationship with each driver. He agreed that the termination of March 15th, prior to completion of its one year period, was not for any reason specified by the ICC as a basis for premature termination of the ICC.

In his "Discussion" of the case, the hearing officer points out that because the ICC in question does not comply with Tex. W. C. Comm'n, 28 Tex. Admin. Code § 112.102 (Rule 112.102), it cannot answer the independent contract/employment question as a matter of law. (The ICC did not contain a specific statement that the owner/operator assumes the responsibilities of an employer for the performance of work and did not contain the Federal tax identification numbers of the parties.)

Article 8308-3.05(a)(4) of the 1989 Act is applicable to the facts of this case and states as follows:

> "Owner operator" means a person who provides transportation service for a motor carrier under contract. An owner operator is an independent contractor.

Article 8308-3.05(d) of the 1989 Act was discussed by the hearing officer at length and states as follows:

> An owner operator and the owner operator's employees are not employees of a motor carrier for the purposes of this Act if the owner operator has entered into a written agreement with the motor carrier that evidences a relationship in which the owner operator assumes the responsibilities of an employer for the performance of work.

While the opinion below also discussed section 3.05(b), we do not believe that subsection applies since, in describing "a person who performs work," that section is less specific to this case than is either 3.05(a)(4) or 3.05(d), both of which address "owner operator." The record shows that respondent was an owner operator. When a conflict exists between a general provision and a special provision dealing with the same subject, the general provision yields to the special provision. Town of Highland Park v. Marshall, 235 S.W.2d 658 (Tex. Civ. App.-Dallas 1950, writ ref'd n.r.e.).

We observe that the contract between appellant and respondent is broad enough to apply to respondent whether he acted alone or for himself and any employees he might have. The record shows, though, that respondent acted alone. With this fact, it appears

not only that section 3.05(a)(4) and 3.05(d) are more specific and therefore control when compared to section 3.05(b), but also that section 3.05(a)(4) prevails over section 3.05(d) for the same reason. Section 3.05(d) begins by addressing "[a]n owner operator and the owner operator's employees . . .," who are then said not to be the motor carrier's employees when the contract with the motor carrier shows ("evidences a relationship") that the owner operator will act as an employer *vis-a-vis* his employees ("assumes the responsibility of an employer for the performance of work"). This section is more general than 3.05(a)(4) since it includes a larger group than "owner operator," namely the "owner operator and the owner operator's employees." Section 3.05(a)(4) begins as only a definition subsection, but its second sentence, "[a]n owner operator is an independent contractor. . ." applies that definition. By viewing each of the three sections discussed as applicable to a different worker(s), each section is harmonized and given effect in light of its purpose. *See* Everett v. U.S. Fire Ins. Co., 653 S.W.2d 948 (Tex. App.-Fort Worth 1983, no writ).

Rule 112.102 does not apply to Article 8308-3.05(a)(4) since it refers only to sections 3.05(d) and 3.05(g). In addition 8308-1.03(18) is not applicable because it defines an "employee" in the context of a "contract of hire." No door has been opened in this case through an applicable rule to look behind the contract referred to in section 3.05(a)(4); and while evidence of subterfuge or abandonment may call for examination of a contract (*See* Texas Workers Compensation Commission Appeal No. 92053 (Docket No. BU/91140558/02-CC-BU31) decided March 27, 1992), neither this contract, nor the practice of the parties, raises that issue.

Although this respondent at the time of the accident on (date of injury), acted alone and was an independent contractor, the contract he signed would have allowed him at any time to bring additional vehicles and their drivers under its terms as his employees. While it would be propitious for a motor carrier to adopt language found in Rule 112.102 when appropriate, that rule does not demand that certain parts of its language be quoted as the only way to comply with its terms. Contract provisions can address that the owner operator is responsible for his/her people in such a way as to fulfill that part of the rule that says, "state that the owner operator assumes the responsibilities of an employer for the performance of work." By considering the terms of the contract, both the words of Article 8308-3.05(d), "evidences a relationship" and those of Rule 112.102(b)(2) are given effect.

The absence of a Federal tax identification number on a contract would not alone disqualify the contract from providing, under section 3.05(d), that a particular group are not employees. *See* Texas Workers' Compensation Commission Appeal No. 92127 (Docket No. VT/91-144915/01-CC-41) decided May 15, 1992.

Having reached this decision on the basis that the contract complies with the applicable statute and establishes that an independent contractor relationship exists, additional issues stated on appeal are moot. Nevertheless we note that neither the Unemployment Compensation Act, nor pronouncements made thereunder, would control this determination. In addition, were it applicable, Rule 112.102 could have been applied

to this case and would not have been considered by the appeals panel to be unconstitutional. As we have previously stated, constitutional issues involving administrative agencies are best left to the courts to decide. *See* Texas Workers' Compensation Commission Appeal No. 91080 (Docket No. SA-00070-91-CC-1) decided December 20, 1991.

We reverse and render that claimant was not an employee at the time of the injury and that no benefits are due.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge