APPEAL NO. 92504

A contested case hearing was held in (city), Texas, on August 12, 1992, (hearing officer) presiding, to determine whether appellant (claimant) was an employee of (general contractor) on or about March 14, 1992, for the purpose of workers' compensation insurance coverage. On that day, claimant toppled from a ladder while painting a tank and broke a leg. Based upon a number of factual findings, the hearing officer concluded that claimant was not on that date an employee of general contractor for workers' compensation coverage purposes, and thus determined he was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). In his request for review claimant asserts the hearing officer erred in making such determination because (subcontractor), the subcontracting entity for whom claimant apparently worked, was not an independent contractor in view of the right of control that general contractor maintained over its activities on behalf of general contractor. Respondent (carrier), the workers' compensation insurance carrier for general contractor, urges our affirmance asserting first that claimant failed to prove he was an employee of subcontractor, and secondly, that the evidence established that subcontractor was an independent contractor.

DECISION

Finding the evidence sufficient to support the findings and conclusions of the hearing officer, we affirm his decision.

Throughout the hearing and upon appeal, the parties have regarded Article 8308-3.05 as the applicable statute for the determination of the independent contractor issue and never alluded to Article 8308-3.06 which applies to contractors and workers involved with residential structures or certain commercial structures. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 112.200 (Rule 112.200). In his request for review, claimant states that Article 8308-3.05 "is the section that we believe is applicable to this fact situation." Accordingly, we too will regard Article 8308-3.05 as the applicable statute. *Compare* Texas Workers' Compensation Commission Appeal No. 91115, decided January 29, 1992, where it was necessary for us to remand for the development of further evidence on the size and nature of the structure, an aircraft rescue and firefighting station, in order to determine whether the hearing officer correctly applied Article 8308-3.06 to the facts in that case. In this case, the work involved the sandblasting and painting of a tank as a part of general contractor's work on a waste water treatment facility for the City of (city). While the evidence did not indicate the size of such facility, the hearing officer's Decision and Order contains no reference to Article 8308-3.06 and provides no reason to believe Article 8308-3.05 was not the applicable statute.

Although in attendance, claimant did not testify at the hearing. His evidence consisted of (subcontract), the written contract between general contractor and subcontractor, and the testimony of (Mr. W) and (Mr. C), a vice president and construction superintendent respectively, of general contractor. The carrier also called these witnesses

for testimony. In its response, carrier's first contention urges that because the testimony established that claimant was not employed by general contractor, and because claimant failed to prove he was employed by subcontractor, he quite obviously could not establish that he became an employee of general contractor for workers' compensation insurance coverage purposes. In his closing statement at the hearing, claimant argued that such a contention was ludicrous because the general contractor's position at the hearing was that claimant was employed by subcontractor. In his arguments, claimant alluded to his working "with" the subcontractor, but did not testify to nor contend that he worked "for" the subcontractor. The hearing officer made no specific finding concerning whether claimant was an employee of subcontractor, but did reach the conclusion, based upon a number of factual findings, that claimant was not an employee of general contractor for workers' compensation coverage purposes. Because the evidence is sufficient to support such findings and conclusion, which are dispositive of the disputed issue, we need not concern ourselves with the absence of a specific factual finding as to whether claimant was an employee of subcontractor, nor with the possibility that such finding could reasonably be inferred from the other findings and the evidence.

Claimant, in argument below, saw the issue as whether the subcontractor, "with" whom he worked, was a subcontractor or an independent contractor. If subcontractor was not an independent contractor, then claimant contended he was covered by the general contractor's workers' compensation insurance pursuant to Article 8308-3.05. Claimant appeared to take an either/or view of subcontractor's status, rather than see that entity as a subcontractor who at that time may or may not also have been operating as an independent contractor. Article 8308-3.05(a) defines general contractor, subcontractor, and independent contractor. Article 8308-3.05(b) provides that "[f]or the purposes of workers' compensation coverage, a person who performs work or provides a service for a general contractor . . . is an employee of that general contractor . . ., unless the person is operating as an independent contractor or is hired to perform the work or provide the service as an employee of a person operating as an independent contractor." Article 8308-3.05(c) provides that "[a] subcontractor and the subcontractor's employees are not employees of the general contractor for purposes of this Act if the subcontractor: (1) is operating as an independent contractor; and (2) has entered into a written agreement with the general contractor that evidences a relationship in which the subcontractor assumes the responsibilities of an employer for the performance of work." Carrier took the position that subcontractor was indeed operating as an independent contractor; that subcontractor had a written agreement with general contractor in which it assumed the responsibilities of an employer for the work; and that claimant--assuming he was an employee of subcontractor--therefore did not become the employee of general contractor for workers' compensation purposes.

(Mr. W) testified he did not know claimant and that claimant had never been hired or employed by general contractor. Mr. W identified the subcontract, dated August 8, 1991, as the contract between general contractor and subcontractor providing for the latter's performance of certain sandblasting and painting of the wastewater treatment plant which

general contractor was working on for the City of (city). He said that subcontractor's primary job was to paint the tank and that this work had been subcontracted because general contractor lacked the qualifications to do that work. He asserted that general contractor had no real right of control over subcontractor stating, "I know that we didn't have control over how he did his work." He went on to testify that the subcontractor is supposed to know how to do the work; that general contractor could not direct the activities of subcontractor's employees; and that general contractor never told claimant when to work or what to do on the job. He stated that while general contractor did have the right to control when the various portions of the job were performed, that is, the order of performance, the subcontractor was free to perform the job however it wanted so long as the job specifications were met. Mr. W also said that subcontractor provided its own labor, materials, and equipment; that subcontractor could hire whomever it wanted, although general contractor reserved the right to control the job site and tell the subcontractor it did not want a particular employee on the job site; that while the subcontract did require subcontractor to pay its employees weekly and to submit certain payroll information to general contractor, subcontractor paid its own employees and determined their hours and wages; that general contractor did not deduct social security payments or taxes for claimant; and, that general contractor was to pay subcontractor monthly based upon the bid amount. Under the subcontract, subcontractor could not sublet, assign, or transfer the subcontract without general contractor's consent.

Mr. W further testified that subcontractor was supposed to provide workers' compensation insurance coverage and that while general contractor had the option to provide such coverage for subcontractor's employees, it did not do so. Article 8308-3.05(e) provides that a general contractor and a subcontractor may enter into a written contract whereby the general contractor provides workers' compensation insurance coverage to the subcontractor and its employees. *And see* Rule 112.101.

(Mr. C), general contractor's construction superintendent, testified that he was on the job site two to three days per week and coordinated the work. He understood subcontractor to be a subcontractor, believed subcontractor had the special skills required for the job when the subcontract was bid, and asserted that general contractor did not have the right to control when subcontractor performed the work. He said that he never told subcontractor when to work, the number of employees to use, or how to perform the work. While subcontractor had employees at the job site, Mr. C did not know who they were. He conceded that under the subcontract the general contractor controlled when subcontractor got paid. Claimant asserted that such control amounted to control over the payment of subcontractor's employees reasoning that if subcontractor did not get paid, its employees likewise did not get paid. Claimant offered no evidence on this point, however. Mr. C also conceded that general contractor controlled alterations or changes to the job, if any, as well as the amount to be paid for such; and that general contractor had the right to require subcontractor to reaccomplish the work. General contractor's right to remove subcontractor's materials from the site was tied to the latter's not finishing the job. He said that general contractor paid no wages to claimant nor did it deduct social security, taxes, or health insurance premiums on

claimant's account. He stated he never told claimant what to do on the job, including the date of his injury. He assumed that subcontractor told claimant to paint the tank and that the ladder from which claimant fell belonged to subcontractor. He did not know whether subcontractor worked for others during the contract period but would not have objected. While general contractor could protest if subcontractor brought some objectionable person to the site, Mr. C said it could not otherwise decide whom subcontractor used to do the job. He said subcontractor did not do good work and never finished the job.

Claimant contended, in brief, that the general contractor's reservations in the subcontract of various rights or remedies was tantamount to general contractor's having a "right of control" over subcontractor's job performance. Thus, argued claimant, subcontractor was not operating as an independent contractor, and claimant therefore qualified as an employee of general contractor for workers' compensation coverage. Article 8308-3.05(a)(5) defines subcontractor to mean "a person who has contracted with a general contractor to perform all or any part of the work or services that a general contractor has undertaken to perform." Article 8308-3.05(a)(1) defines independent contractor to mean:

a person who contracts to perform work or provide a service for the benefit of another and who ordinarily:

(A)acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;

(B)is free to determine the manner in which the work or service is performed including the hours of labor of or method of payment to any employee;

(C)is required to furnish or have his employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and

(D)possesses the skills required for the specific work or service.

The hearing officer found that on March 14, 1992, subcontractor was a subcontractor of general contractor; that subcontractor hired its own employees and furnished the necessary tools, supplies and materials to perform sandblasting and painting of the project being constructed by general contractor; that subcontractor directed the activities of its employees in performing the work under the subcontract; that subcontractor indicated that it possessed the special skills and equipment necessary to perform the sandblasting and painting of the wastewater treatment facility being constructed by general contractor; that general contractor did not determine the daily work schedule for the sandblasting and painting activities performed by subcontractor's employees; that the employees responsible for the sandblasting and painting were selected by and their work controlled by subcontractor; and that subcontractor operated as an independent contractor and had a written agreement with the general contractor that evidenced a relationship in which

subcontractor assumed the responsibilities of an employer for the performance of work. Based upon these findings, the hearing officer concluded that subcontractor operated as an independent contractor, and that claimant was not an employee of general contractor for workers' compensation coverage purposes on March 14, 1992.

There is ample evidence to support the factual findings and legal conclusions. Claimant presented no evidence directly controverting the testimony of general contractor's employees concerning the matters which define an independent contractor as stated in Article 8308-3.05(a)(1). Claimant argued that what mattered were not the controls which general contractor actually asserted over subcontractor, but rather the right to control which it reserved in the subcontract. We find claimant's interpretation of a number of such subcontract provisions to be strained, and both the quality and quantum of the evidence establish that subcontractor was indeed an independent contractor. *Compare* Texas Workers' Compensation Commission Appeal No. 92155, decided June 4, 1992.

In considering a challenge to the sufficiency of the evidence, we observe the provisions of Article 8308-6.34(e) that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of the weight and credibility it is to be given. As the trier of fact, it was for the hearing officer to resolve inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ.) The findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W. 2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge