APPEAL NO. 92584

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On September 28, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent, claimant herein, has received no wages so that appellant, carrier herein, should continue to pay temporary income benefits (TIBS). Appellant asserts that even though claimant is a partner in a shop, the nature of the work makes him an employee and his profits should be considered as wages.

DECISION

Finding that the decision is sufficiently supported by the evidence, we affirm.

Claimant was working for (employer) in (date of injury) when he injured his neck, which apparently affects his left arm. Carrier has been paying TIBS for that injury. The only issue in this hearing is whether claimant is receiving wages which should diminish the amount of TIBS being paid.

Claimant in 1989 first entered into a partnership with JJ. This partnership is set forth in writing by a document dated January 1992. There was no evidence that the partnership provisions were different prior to January 1992 from what is recited in that document. There was no evidence that the partners currently operated in a manner different from what is set forth in the written agreement. The agreement is short, and pertinent parts read as follows:

We, also, agree that each one of the parties is equally responsible for all outstanding debts and liabilities.

We, also, agree to evenly divide all incoming receipts and invoices, or profit as the case may be.

The agreement is signed by JJ and the claimant, the only two partners.

The partnership is in the business of modifying pipe; the record indicates that a large amount of the pipe it uses would be of a diameter and gauge as would be found in automotive exhaust pipe. Pipe is bent and welding is done to reach specifications set forth primarily in one contract with a large corporation. Some aspects of the work call for heavy lifting, but there is work involving very light weight articles. According to the testimony of both claimant and JJ, claimant provided the expertise to see that the job was done right and JJ provided the ability to obtain financing for machinery, etc. (The written agreement did not address this.) While both agreed that under the partnership agreement claimant was just as responsible for debts as was JJ, the loan documents were signed only by JJ. Claimant was paid no salary. After expenses were paid each month, claimant and JJ split the profit, if any. If there were no profit, claimant received nothing that month.

Claimant described his function in the partnership as making sure the job is done right. He said that he is "always there" (at work) but that he works with the pipe probably 20 minutes per day on average. He added that if he were not at the site, he would still get one-half of the profits, if any. Claimant's son and son-in-law, who worked for the partnership, said that claimant supervised, instructed and coordinated. The son-in-law emphasized claimant's time on the phone and the fact that he was "just there;" he added that claimant would at times "lend a hand" (with no heavy lifting), but said most of the time that claimant is "in the way." JJ testified that claimant worked more than 20 minutes a day.

JJ testified that claimant was supposed to take care of production. He said that since February 1992, $18,000 had been distributed to claimant. He said that claimant's services were necessary to perform the contract, which the partnership had, calling for the modification of pipe. JJ further characterized claimant's responsibility as to see that the shop ran correctly, to see that everything was done and orders were filled. While he said that if claimant did not participate, he would get nothing, JJ also described a period of over 40 days when claimant was not at the shop. JJ acknowledged that during that period claimant still received one-half of the profits.

The hearing officer found that claimant is an owner in a partnership that does business. He found that claimant receives one-half of the net proceeds and that if there is no profit, claimant receives nothing. The carrier asserts error in the finding of fact that said claimant is not an employee of the partnership and in the conclusion of law that said claimant had received no wages therefrom.

Article 8308-1.02(47) of the 1989 Act says:

> Wages includes every form of remuneration payable for a given period to an employee for personal services. The term includes the market value of board, lodging, laundry, fuel, and other advantage that can be estimated in money which the employee receives from the employer as part of the employee's remuneration.

Article 8308-4.23(c) of the 1989 Act says, in part:

> temporary income benefits are payable at the rate of 70 percent of the difference between the employee's average weekly wage and the employee's weekly earnings after the injury, . . .

"Earnings" is not defined in the 1989 Act. However, it appears that "earnings" are equated to "wages" in Article 8308-4.23 of the 1989 Act because 4.23(d) says, in part, "(t)he weekly temporary income benefit under this subsection may not exceed 100 percent of the employee's actual earnings for the previous year. A rebuttable presumption of the employee's actual earnings for the previous year shall be established by the following methods:

(1)the sum of the employee's wages as reported in the most recent four quarterly wage reports to the Texas Employment Commission shall be taken and divided by 52; or

(2)if the commission finds that the employee's most recent four quarters' earnings, as reflected in the Texas Employment Commission wage reports, are not representative of the employee's usual earnings, the commission shall use the single quarter of the most recent four quarters in which the employee's earnings were highest divided by 13; or

(3)if the Texas Employment Commission does not have a wage report reflecting at least one quarter's earnings due to the fact that the employee worked outside the state during the previous year, the commission shall determine the actual earnings for the previous year for purposes of this subsection from other credible evidence." (emphasis added.)

Wages is the only payment method used to describe earnings.

Since no issue has been raised that claimant has ended disability because he is now able to obtain and retain employment at wages equivalent to the preinjury wage, the Appeals Panel is not concerned with whether claimant actually bent or welded pipe for 15 minutes a day or several hours a day. The issue only addresses what the comparison is between claimant's wage before the injury with his earnings after the injury to determine the rate of TIBS that should be paid. (*See* Article 8308-4.23(c) of the 1989 Act.) The Appeals Panel in Texas Workers' Compensation Commission Appeal No. 92021, decided March 9, 1992, looked at whether revenue in a sole proprietorship was "wages." In that opinion the welder did not pay himself a salary, but lived on the profits. The panel went on to say that "(t)he comparison before and after an injury must be based upon `wages', not income." It concluded that the hearing officer erred in looking to income from the business of welding as wages. In looking at the status of the sole proprietor, that opinion stated, "inclusion of welding revenues as `wage' could only occur if respondent earned money as an `employee' of another . . ."

Carrier, in its appeal, cites two cases that look at "dual capacity" of a worker. Harris v. Cas. Recip. Exchange, 632 S.W.2d 714 (Tex. 1982) and Penn. Nat. Mut. Cas. Ins. Co. v. Hannah, 701 S.W.2 67 (Tex. App.-Beaumont 1985, writ ref'd n.r.e.). Harris involved an officer in a corporation who took a position held by a previous employee. The salary of this position, a night manager in a club, was included within the insurance premium paid for workers' compensation insurance. Even though the law at that time had a provision for optional executive coverage, which had not been chosen by the employer, the court held, "(p)ersons who are hired to fill *both* executive and `employee' positions, and who are injured while performing the latter type of activity, fall squarely within the `employee' definition . . . and are thereby covered. . . ." In the Hannah case, the court, on a no evidence review,

found some evidence that a sole proprietor of a construction business did have employee status.

Three cases look more narrowly at employee status, with two being more recent than Harris and one being more recent than Hannah. Powell v. Vigilant Ins. Co., 577 S.W.2d 364 (Tex. Civ. App.-Tyler 1979, no writ), involved injury to a person who owned 20 percent of a motel and was injured at the site; the injury and the effort put into the business by Powell were not described. The court said, "(a) partner is usually held to be an employer and therefore he cannot be said to be an employee as contemplated by the workers' compensation act." It affirmed summary judgment for the carrier. Leal v. U.S. Fire Ins. Co., 682 S.W.2d 591 (Tex. App.-Austin 1984, writ ref'd n.r.e.) considered an owner (sole proprietor) who fell from a roof; he covered his employees but did not elect to take coverage on himself (optional at that time). The court said that he had to satisfy the statutory definition of "employee." It then said, "(t)his he could not do as a matter of law." The court emphasized that he was not in service to another and referred to the Harris case as involving a decedent who had been "in the service of another." It said, ". . . sole proprietor can not be his own employee under the Act." Finally, Danzy v. Rockwood Ins. Co., 741 S.W.2d 613 (Tex. App.-Beaumont 1987, no writ) again involved a summary judgment for carrier that was affirmed. Danzy was a sole proprietor. The court said, "(a)ppellant was not an `employee'; . . . Danzy was not in the service of another." In affirming, the court cited Leal.

Carrier's rationale was that claimant could take on employee status and as such his income could be considered to be wages. Looking at the facts of the case on appeal, the hearing officer had a sufficient basis to find that claimant was not an employee, even though the Harris case and Hannah case provide some basis, in an appropriate setting, to consider employee status for an officer in a corporation and perhaps even for a sole proprietor. The cases including Leal are just as pertinent to the question of whether claimant was an employee; they, along with Appeal 92021, *supra*, provide a sufficient legal basis on which to base the hearing officer's finding. The definition of "wages" is not so directly attacked by the carrier. The references to that term in Articles 8308-4.23 and 1.02(47) of the 1989 Act do not indicate that net income from a business is included therein but together they do require that what is received must be by an employee for personal services. We have seen that both Appeal No. 92021 and the Leal line of cases look upon the aspect of service to another as a meaningful criterion. The hearing officer was not just provided evidence that profits were to be split between partners and that no money was received at the end of a period if there were no profit, even JJ said that claimant received his share of the profit during the over 40 days that he did not appear at the shop. The business arrangement began before the injury for which claimant receives TIBS. The hearing officer's conclusion that claimant received no wages from the partnership is sufficiently supported by the evidence and is consistent with the law.

The decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge