APPEAL NO. 92605

A contested case hearing was held on August 31, 1992, at (city), Texas, following continuances on June 15, 1992, and July 28, 1992. (hearing officer) presided as hearing officer. He determined that the respondent, (claimant), was the employee of (employer), who carried workers' compensation coverage with appellant (carrier), for the purposes of workers' compensation benefits. He ordered the carrier to pay benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). Carrier urges error in the hearing officer's determination that claimant was both an independent contractor and subcontractor on the date of injury, in the hearing officer's finding that the claimant was directed by a supervisor of the employer to move a traffic barrier, and that the claimant was an employee of the employer for workers' compensation purposes at the time of injury. Respondent (self-insured) asks that the decision of the hearing officer be affirmed.

DECISION

Finding the evidence sufficient to support the determinations of the hearing officer and a correction application of the law to the facts of the case, we affirm.

The hearing officer set forth a fair and adequate summary of the pertinent evidence in this case in his Decision and Order. We adopt it for purposes of this decision. Succinctly, the case involves who, if anyone, is liable for workers' compensation benefits: the fact of a compensable injury not being in dispute. The claimant is a commissioned police officer who also works extra jobs as a flagmen at construction sites. The City of (city) (self-insured) contracts with independent contractors such as employer to perform such projects as sewer construction work. A part of the contract requires that when needed the employers must have uniformed officer of the law at the project site for traffic control. The employer obtains the flagmen and is reimbursed for the costs at a rate as specified in the contract. In a memorandum to the contract, the city inspector is given general control and direction over various aspects of the flagmen program requirements.

The claimant indicated that he got a position as a flagman with the employer after he had been told about the positions by a fellow police officer who acted as a coordinator for the employer in obtaining flagmen. The fellow police officer was not an employee of employer but does flagman work for employer as an independent contractor. He was not paid for the coordinating aspects of his relationship with the employer but was paid the contract specified rate when he works as a flagman. Sometime before December 30, 1991, claimant, as a single individual independent contractor, obtained the position as a flagman with employer. He furnished his own uniform, firearm, and commission credentials and was not provided any equipment by the employer. He indicated that he considered himself an employee of employer, stated that employer's supervisor called him into work and gave him general directions on the area in which he was to work in directing traffic (although the method of directing traffic was strictly within his discretion and control as a police officer), and testified that he was paid a specified hourly rate by check by the employer without any

deductions being taken out for withholding, social security, medical insurance, workers' compensation premiums or other items. The claimant stated that he never talked to a city inspector, never received any instructions about what to do from any city inspector and did not have any contact regarding the flagman position with the City of (city).

A witness for the employer in charge of personnel testified that the claimant was not an employee of employer, had not applied for employment and was not listed in the personnel records. He indicate that under the sewer construction contract with the City of (city), flagmen were required and that the employer paid for the flagmen but was reimbursed by the city. He indicated the claimant performed services at the sewer construction site as a flagman. He stated that the employer did not direct or instruct flagmen on their traffic directing duties. He said that they had laborers who set up the necessary barricades at the job site. The claimant was injured when he assisted the employer's foreman in lifting and moving a barricade when some heavy equipment appeared about ready to hit it.

The issue at the hearing concerned whether either the self-insured or the employer was the employer of the claimant for workers' compensation purposes on December 30, 1991. The hearing officer determined that the claimant was an independent contractor who was a subcontractor to the employer on December 30, 1991. He also found that an employer supervisor directed claimant to move the barrier which is related to his injury. The appellant raises this latter finding as a "minor sub-issue" and argues that the evidence does not support that finding. We agree that there was no direct evidence that the supervisor "ordered" or "directed" the claimant to move the barrier. Rather, the evidence is not clear and suggests that it was not out of the ordinary for a flagman to move or assist in moving a barrier on occasion, although not technically within the flagman's "job description." On December 30th, the claimant stated he could not remember specifically if the foreman asked him to help move the barrier or if it was taken for granted as it was not unusual to move barriers and that "sometimes they asked and sometimes not." In any event, the hearing officer found that the claimant's moving of the barrier was an activity that furthered the business purposes of employer and, in our view, is not of particular significance to the disposition of the case under the circumstances present.

As the appellant aptly points out, as a general proposition and under the law prior to the 1989 Act, a general contractor such as the employer here would not have any workers' compensation liability for an injury occurring to an independent contractor. Article 8308-3.05(b). However, a new provision of the 1989 Act establishes liability for workers' compensation purposes in certain limited circumstance that are present in this case. Article 8308-3.05(l) provides as follow:

> If a general contractor has workers' compensation insurance to protect the general contractor's employees and if in the course and scope of the general contractor's business the general contractor enters into a contract with a subcontractor who does not have employees, the general contractor shall be treated as the employer of the subcontractor for the purposes of this Act and may enter into an agreement for the deduction of premiums paid in accordance with Subsection (e) of this section.

We have observed in a previous case that "[a]rticle 8308-3.05(l) contains a provision that is new to the 1989 Act, applicable to "single person" subcontractors; in essence, a small form of "mandatory" workers' compensation coverage is provided when a general contractor who has workers' compensation insurance enters into a contract with a subcontractor who does not have employees. That section provides that the general contractor will be considered as the "employer" of such a subcontractor for purposes of the 1989 Act, and may enter into an agreement with the subcontractor to deduct premiums paid." Texas Workers' Compensation Appeal No. 91115, decided January 29, 1992. The limited nature of this provision is manifest. By contrast there is no similar provision that applies to single independent contractors serving as subcontractors in building and construction work as described in Article 8308-3.06, absent a written agreement.

We do not find persuasive the carrier's position that it was improper for the hearing officer to classify claimant as an independent contractor and as a subcontractor concurrently and that such dual classification "is not authorized under the statute and causes inherit (sic) conflicts within the statute . . .." While there may well be authority indicating an individual cannot be both an employee and an independent contractor (Wasson V. Stracener, 786 S.W.2d 414, 420 (Tex. App.-Texarkana 1990, writ denied)), the definitions of the terms "independent contractor" and "subcontractor" in the 1989 Act (Article 3.05(a)(1) and (a)(5)) clearly indicate that an independent contractor can be (and probably frequently is) a subcontractor. Article 8308-3.05(c) specifically refers to the situation where a subcontractor operates as an independent contractor, although the basic concern of that subsection does not apply to this case. The effect of Article 8308-3.05(l) on the particular facts present here is to create, for purposes of workers' compensation coverage, the relationship of employer/employee.

Having carefully reviewed the evidence of record in this case, we find it to be sufficient to support the factual findings made by the hearing officer. Based upon the appropriate conclusions flowing from those findings and the application of the specific and limited provisions of Article 8308-3.05(l), we affirm his decision and order holding the carrier liable for workers' compensation benefits.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge