APPEAL NO. 92648

This case arises under the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992). A contested case hearing was convened in (city), Texas, on September 16, 1992; was recessed to allow the parties to submit legal arguments supporting their positions, with the hearing closed on September 26th; and was reopened on October 2nd for additional evidence to be submitted, with the record formally closed on October 20th. The issues before the hearing officer, (hearing officer), were as follows:

1.Was the claimant, respondent in this appeal, an employee of (employee), on (date of injury), or was he an independent contractor? Did the carrier, appellant in this appeal, waive the right to raise this issue by failing to contest compensability as required by Article 8308-5.21(a)?

2.Has the claimant reached maximum medical improvement (MMI) and, if so, on what date?

3.What is the claimant's impairment rating as a result of his injury on (date of injury)?

The hearing officer held, in summary, that on the date of his injury the claimant was not an employee of (Cherokee), the entity which had workers' compensation coverage from carrier, but that because the carrier did not timely raise the issue of claimant's employment status, it waived its right to contest the compensability of the claim. He also held that the claimant reached MMI on May 11, 1992, and that he has an impairment rating of five percent.

In its request for review the carrier does not dispute the hearing officer's determination that the impairment rating is five percent. However, it alleges error in the hearing officer's conclusions of law that the carrier waived its right to contest compensability pursuant to Article 8308-5.21(a), and that the claimant reached MMI on May 11th. No request for review nor response was filed by the claimant.

DECISION

We affirm the hearing officer's determination that claimant reached MMI on May 11, 1992, as found by the designated doctor. With regard to the issue of whether claimant was an employee of Cherokee and whether this issue was waived by carrier's failure to contest compensability pursuant to Article 8308-5.21(a), we reverse the determination of the hearing officer and render a new decision that claimant was an employee of Cherokee.

There was no dispute that the claimant, a truck driver, was injured on (date of injury), when he slipped and fell while adjusting chains on the truck he had been driving. He suffered injuries to his left shoulder, ribs, and head, was treated initially in an emergency room in (state) (where the injury occurred) and returned to (city), Texas, where he was seen by (Dr.

G), who became his treating doctor. He was also referred to several other doctors.

Although claimant said he drove a Cherokee truck and contended that he was employed by Cherokee, the carrier maintained that claimant was actually the employee of (Charter) on the date of injury. A contract between Charter and Cherokee was admitted into evidence which, carrier maintained, showed that Charter was an independent contractor of Cherokee. The hearing officer determined that Charter was an independent contractor of Cherokee, and that claimant was the employee of Charter.

No medical reports of Dr. G were made part of the record, except for an undated Report of Medical Evaluation (Form TWCC-69) which found MMI as of January 6, 1992, with a 16 percent impairment rating. Because the carrier disputed the impairment rating assigned by Dr. G, (Dr. P) was appointed designated doctor by the Commission. Dr. P found MMI had been reached on May 11, 1992, and assigned a 13% whole body impairment rating, five percent due to claimant's shoulder and eight percent for episodic neurologic impairment. The hearing officer determined that claimant reached MMI on May 11th and that his impairment rating was five percent. Because neither party appealed the hearing officer's determination of impairment, we will not address that issue in this opinion or comment on whether or not the hearing officer should have bifurcated the impairment rating.

Despite the foregoing, as stated in the hearing officer's statement of evidence, the processing of this claim was uneventful, with claimant receiving 52 weeks of temporary income benefits from January 13, 1991 through January 11, 1992. Following Dr. G's assessment of impairment, the carrier began paying impairment income benefits at eight percent, and paid such benefits from January 6, 1992 through June of 1992. While the carrier disputed the impairment rating in January of 1992, it admittedly did not dispute the claim itself until the benefit review conference on July 22, 1992.

The carrier urged at the hearing, and contends on appeal, that because the carrier's challenge to this claim centers on the issue of whether claimant was the employee of Charter, an entity not covered by the policy issued by carrier, it is not a dispute as to compensability and the carrier thus has not waived its right to assert this defense under Article 8308-5.21(a) or Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (Rule 124.6(c)).

Article 8308-5.21(a) provides in pertinent part as follows:

> An insurance carrier shall initiate compensation under this Act promptly. If the insurance carrier does not contest the compensability of the 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 . . .

Article 8308-5.21(a) also says a carrier shall be allowed to reopen the issue of compensability if there is a finding of evidence that could not have been reasonably

discovered earlier. However, the carrier in this case did not contend its delay was due to newly discovered evidence.

Subsection (b) of Section 5.21 provides that no later than the seventh day after the date on which the carrier receives written notice of the injury, it shall either begin payment of benefits as required by the Act or shall notify the Commission and the employee in writing of its refusal to pay. Subsection (c) provides that the carrier's notice must specify the grounds for refusal, and that the grounds specified constitute the only basis for the carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date.

Rule 124.6, Notice of Refused or Disputed Claim, basically sets forth the information which the carrier must provide in such notice (Form TWCC-21), both when it refuses to begin payment of benefits (seven day notice) and when it disputes compensability after payment of benefits has begun. In the latter case, the rule provides that the TWCC-21 must be filed on or before the 60th day after the carrier received written notice of the injury or death. It also provides that all facts set forth as grounds for contesting compensability shall be based on actual investigation of the claim, and shall describe in sufficient detail the facts resulting from the investigation that support the carrier's position. Rule 124.6(c).

We need not decide the question of the applicability of Article 8308-5.21(a) because, upon review of the record in this case, we find that the hearing officer's determination on the first part of the employment issue--that claimant was not the employee of Cherokee--is against the great weight and preponderance of the evidence.

The 1989 Act defines "employee" as a person in the service of another under any contract of hire, either express or implied, oral or written. The term does not include an independent contractor. Article 8308-1.03(18).

This definition is carried forward into the concepts of "motor carrier" and "owner operator" in the 1989 Act. *See* Articles 8308-3.05(a)(3) and (4). Article 8308-3.05(b) provides that for the purposes of workers' compensation insurance coverage a person who performs work or provides a service for a motor carrier who is an employer under this Act is an employee of the motor carrier, unless the person is operating as an independent contractor or is hired to perform the service as an employee of an independent contractor. Under Article 8308-3.05(d), an owner operator and its employees are not employees of a motor carrier for purposes of the 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.

Whether an injured person was an employee or an independent contractor at the time of injury is determined by whether the alleged employer had the right of control over the individual's work. Continental Insurance Company v. Wolford, 526 S.W.2d 539 (Tex.

1975). The right of control of a servant is usually a question of fact. Sparger v. Worley Hospital, Inc., 547 S.W.2d 582 (Tex. 1977). Even where there is an express right to control an employee set forth in a contract, the surrounding facts and circumstances may still be considered in determining right to control. Newspapers, Inc., v. Love, 380 S.W.2d 582 (Tex. 1964).

Looking at the evidence in the record below, we do not find sufficient evidence to support the hearing officer's determination that claimant was the employee of Charter rather than Cherokee. The carrier introduced into evidence an "Independent Contractor Agreement" executed on November 6, 1989, between Cherokee and Charter. Under the contract Charter agreed to transport on behalf of Cherokee such commodities as Cherokee periodically was to make available. Among other things, the contract provided that Charter was to determine the means and methods of performing the transportation services, including hiring and supervising drivers and other employees. The contract identified two trucks to be used to augment Cherokee's fleet. However, it did not identify claimant as a Charter employee or provide that claimant was to operate a Charter truck.

(Ms. R), a claims adjustor with Crum & Forster who was responsible for claimant's claim, testified that the contract document came from her file, and had been obtained somehow by the prior adjustor. She also stated that to the best of her knowledge the contract (which was not for a specified term) had not been superseded, abrogated or changed in any way after it was executed and that, to the best of her knowledge, it was in effect on (date of injury), the date claimant was injured.

Also introduced by carrier was an undated, unsigned (state) Employer's First Report of Work Injury, listing the employer as (Charter), and reporting claimant's injury of (date of injury). Ms. R testified that she was not aware of any other first report of injury being filed by any other employer in connection with this claim. There was no evidence this form was filed with the Texas Workers' Compensation Commission. *See* Article 8308-5.05. Carrier also introduced into evidence a copy of its workers' compensation policy insuring Cherokee, which showed that Cherokee's employees were classified as clerical office employees.

Claimant testified that he was hired by Cherokee in (city), Texas, that he began working as a driver for Cherokee around October of 1990, that Cherokee dispatched him and told him what to haul and where, and that he drove a Cherokee truck. He also stated that his paycheck came from Charter, although he said that, "Charter paid it, but Cherokee--it was their truck, and Charter is Cherokee." Claimant also introduced into evidence, apparently without objection, a signed but unsworn statement dated September 18, 1992, from (RC) which stated: "This letter is to confirm that [claimant] on October 1, 1990 was employed by (Cherokee) (county), (state). as a full time truck driver. At the above date I was employeed (sic) as the terminal manager."

The evidence adduced by the carrier may have established the relationship between Cherokee and Charter, but it is not dispositive of the issue of which company had the right

to control claimant. The only evidence carrier produced which bore upon claimant's relationship to either of the companies was the (state) Employer's First Report filed by Charter. Claimant testified that, following his injury in (state), he was driven by another driver as far as (city), (state), and from there was flown back to Texas. There was no evidence as to whether or when he or anyone else communicated with Charter or Cherokee regarding the injury. We are not aware of, nor can we construe the laws of another state. We note, however, that Texas law considers an employer's first report to be only the employer's memorialization of information provided to or obtained by it. The 1989 Act provides that each employer shall maintain a record of injuries as reported by employees or otherwise made known to the employer, and that the information contained in such a record may not be considered an admission by the employer that the injury did in fact occur or that any fact contained therein is true. Article 8308-5.04(a), (c).

Claimant, on the other hand, testified that he was employed by Cherokee, drove Cherokee's truck, and that Cherokee directed the details of his work. Further, he produced a statement that purports to be from Cherokee's terminal manager, verifying his employment with Cherokee. The hearing officer noted in his decision that this was a late filed exhibit, received into evidence more than a month before the record closed. No other evidence to refute this statement was offered by carrier, notwithstanding that the record had not yet closed. Though not necessary for our decision, we note that claimant introduced, after the carrier's evidence was presented, three certificates, namely, a "Medical Examiner's Certificate," a "Driver Qualification & Identification Certificate," and a "Certificate of Written Examination." The latter two documents were issued to claimant by Cherokee and signed by (RC) as "Manager." When carrier raised what it called a "technical objection" to the effect that claimant had not timely exchanged these documents after the benefit review conference, the hearing officer summarily sustained the objection and further commented on the irrelevance of these documents.

No doubt the lack of evidence bearing upon the employer-employee relationship made the hearing officer's determination of that issue a difficult one in this case. However, we will set aside the determination of the fact finder where, as here, we find that that determination is not supported by sufficient evidence, or is so against the great weight of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We reverse the hearing officer's determination and render a new finding and conclusion that claimant was the employee of Cherokee.

The carrier also challenges the hearing officer's conclusion that the claimant reached MMI on May 11, 1992. This conclusion was based on the hearing officer's finding of fact that the designated doctor, Dr. P, certified MMI as of that date. The carrier argues that while Articles 8308-4.25(b) and 4.26(g) give presumptive weight to the report of the designated doctor as regards MMI and impairment rating, respectively, nothing in the statute gives presumptive weight to the date of MMI. That being the case, carrier argues, the hearing officer had an obligation to review the evidence and make a fact finding determination as to when the claimant actually reached MMI. In this case, it argues, the

evidence is overwhelming that the claimant reached MMI on January 6, 1992, the date certified by his treating doctor.

Carrier's attempt to distinguish the achievement of MMI from the date it is achieved, for purposes of according presumptive weight to the designated doctor's opinion, creates a spurious distinction. Both Articles 8308-4.25(b) and 4.26(g) provide that "the report of the designated doctor shall have presumptive weight . . . unless the great weight of the other medical evidence is to the contrary." We can find no grounds to separate MMI and its date for these purposes. We also find nothing to indicate that the hearing officer did not consider the other medical evidence in the record, including the date the treating doctor certified MMI in reaching his conclusion. Carrier further argues that "[a]s a practical matter, a designated doctor is always going to certify a later date of [MMI] because the designated doctor always sees the employee after some other doctor has already certified that the claimant has reached [MMI]. Designated doctors also will usually assess MMI as of the date they saw the employee, because that is the only date from which they have personal knowledge of the employee's condition. That is in fact what happened in this case . . ."

The situation carrier posits may or may not be true, depending upon the individual designated doctor. Certainly nothing in the 1989 Act prevents a designated doctor from selecting an MMI date earlier than the date of the designated doctor's examination. Most important, however, is the fact that the date chosen by the designated doctor reflects his or her professional judgment, based upon examination of the claimant and review of the other medical evidence. That this was done in this case is underscored by a hearing officer exhibit in the record of the hearing which was referenced by the carrier in arguing for an earlier MMI date. In an October 5, 1992 letter to the hearing officer Dr. P stated, with regard to date of MMI, "[s]ince I have only seen [claimant] on one occasion, that being May 11, 1992, I cannot really give opinion about occurrences prior to that time. I did feel that through the history, physical examination, and review of medical records, which I did for that visit, that he had probably reached [MMI] at the time of the May 11, 1992 visit." Upon review of the evidence in the record, we find no grounds for reversing the hearing officer's determination that the claimant reached MMI on May 11, 1992.

The hearing officer's Finding of Fact No. 10 and Conclusion of Law No. 4, that claimant reached MMI on May 11, 1992, are affirmed. We reverse that portion of the hearing officer's Finding of Fact No. 5, which states Charter had the right of control over claimant, Finding of Fact No. 6 and Conclusion of Law No. 2 that claimant was the employee of Charter, and render that claimant was the employee of Cherokee.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge