APPEAL NO. 92717

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (1989 Act) (Vernon Supp. 1993). A contested case hearing was held in (city), Texas, before (hearing officer), on November 2, 1992. Upon agreement of the parties, the issues to be considered were stated as follows:

1.Was Temporaries of Texas or Interstate Building Maintenance the employer on (date of injury), when claimant suffered a back injury?

2.Who is the correct carrier for the purpose of workers' compensation benefits that may be due and payable in this case?

The hearing officer essentially held that claimant's work activities were under the control and direction of Interstate Building Maintenance, which was the claimant's employer for the purpose of workers' compensation coverage on (date of injury). The hearing officer accordingly determined that (city) General Insurance Company, the insurance carrier for Interstate Building Maintenance, is the carrier responsible for claimant's workers' compensation claim, and he ordered that that carrier pay claimant medical and income benefits in accordance with the 1989 Act.

(City) General Insurance Company has appealed the decision of the hearing officer, objecting to certain of the findings of fact and conclusions of law stated therein. It also argues that principles of equity should have been given greater weight, in particular the doctrines of quasi-estoppel, equitable and judicial estoppel, and waiver.

The claimant has also filed a request for review, objecting to certain findings and conclusions, and she seeks a decision that both companies are her employer. However, because the claimant's request for review was not timely, we will not consider it. The 1989 Act requires that a party that desires to appeal the decision of the hearing officer shall file a written appeal with the Appeals Panel not later than the 15th day after the date on which the decision is received from the Division of Hearings. Article 8308-6.41(a). The record in this case shows the hearing officer's decision was distributed on December 11, 1992. Rules of the Texas Workers' Compensation Commission, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) provide that for purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the Commission shall deem the received date to be five days after the date mailed. In addition, Rule 143.3(c) provides that a request for review of the decision of the hearing officer shall be presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and received by the Commission or other party not later than the 20th day after the date of receipt of the hearing officer's decision.

The claimant's request for review, which was dated January 11, 1993, was sent by overnight courier on January 14th and was received by the Commission January 15th. The

claimant does not state when she received the hearing officer's decision. Applying the statute and the rules to these facts, the claimant's request was untimely. However, because (city) General's appeal was timely we will review the hearing officer's decision based on the arguments raised by that appeal.

DECISION

Finding no error, we affirm the decision and order of the hearing officer.

For the sake of simplicity, we will refer to Temporaries of Texas as Company A and their carrier, U.S. Fire Insurance Company, as Carrier A. Likewise, Interstate Building Maintenance will be referred to as Company B and their carrier, (city) General Insurance Company, as Carrier B.

The claimant testified that her friend, (Mr. H), who was a custodian working for Company B at a Texas Instruments (TI) facility, had advised her of a job opening where he worked. On August 28, 1991, she went with Mr. H to Company A because he told her she had to go through Company A to get hired to work at the TI location. On that day, she filled out an application with Company A and was interviewed by a Company A employee, (Ms. DV). Claimant said she told Ms. DV that she specifically wanted to work for Company B at the TI plant. She also said she was not hired that day because Ms. DV said she needed to bring in a doctor's release regarding an earlier injury and undergo a drug test; however, she said Ms. DV sent her to TI to talk with (Ms. N), who worked for Company B, and to have her look over the paperwork and interview her. Claimant interviewed with Ms. N, but was not offered a job at that time. She said she mentioned to Ms. N that she needed to get the medical release requested by Company A.

A few days later, on a Sunday, Ms. N contacted claimant and told her to come to work that night. Claimant reported to work, where she received a badge from TI security, and went to work pursuant to Ms. N's instructions. (Claimant said the badge had Company B's name on the back of it, although Ms. N later testified that the badge said "Company A." However, it was uncontroverted that she filled out a time card with Company A's name on it.)

In the course of her work at the TI facility, claimant said Ms. N instructed her on a daily basis as to her job duties, and Company B furnished all her cleaning supplies, equipment, and uniforms. It was her understanding that Ms. N could fire her after she was written up three times. No one from Company A came to the work site or told her what to do, although she picked up from Company A's office both of the two paychecks she earned before she stopped working.

Claimant testified that even though Ms. DV told her she would not be eligible for hire until she presented a medical release, she was nevertheless given paperwork (a security clearance) to take to Ms. N. After Ms. N called her to come to work, she did not notify

Company A immediately; however, when she went to Company A a few days later with Mr. H to pick up his check, she was told by Ms. DV "that I should have never gone to work there, that [Ms. N] had no right to call me because I had not had my medical release" and "that they were the ones that was supposed to call me to go to work at [TI]."

On the evening of (date of injury), claimant was assisting another worker put trash into a gondola when she slipped and fell, hitting her hip and back on a bench and landing on the floor. The other worker called Ms. N immediately, and claimant was taken by ambulance to a hospital. The next day she also notified Ms. DV at Company A of her injury. She testified that she had seen several doctors, and that at the time of the hearing she had been taken off work.

Ms. N testified that she supervises the cleaning crew at the TI facility for Company B. She said that she had put in a job order with Company A and that Company A had sent claimant to Company B. She said she called claimant to come to work because "all her paperworks (sic) were in from [Company A]. So she was in the system, ready to come to work . . . [s]he had been drug tested and she had an SOQ [security clearance], and it was signed by [Ms. DV] to come to work." She said she did not contact Company A after telling claimant to come to work. In her opinion, however, claimant was an employee of Company A because she was still a new employee, and all new employees worked for Company A first. After a probationary period, those individuals who are dependable and good employees are given an offer to work directly for Company B, and to end their relationship with Company A. Seven of the 22 people she supervises were Company B employees, although she said all 22 had been hired through Company A.

Ms. N said that all the cleaning crew works under her daily supervision and direction; no one from Company A ever comes out to the job site nor gives her any instructions. She said she had the authority to fire someone like claimant; however, on cross-examination she clarified that she had authority to sever the relationship between Company B and the individual (i.e., the assignment to TI) and not to terminate the relationship between the individual and Company A.

(Ms. S) testified she is the general manager of Company A. She said their procedure with regard to placing personnel with Company B is to have the person fill out a Company A application, an I-9, drug testing paperwork and an SOQ which she said is TI's security clearance documentation. (In claimant's case, since she had noted a prior injury, she was also told to get a doctor's release before she could be considered; because of the need for the release, claimant's urine specimen was also not sent to the lab for testing.) If there currently is no job for a position, the person's name is put on a "hot list" from which Company A contacts individuals when a job order comes in. At the time claimant interviewed, Ms. S said, there was no outstanding job order from Company B. She said because her office is next to that of Ms. DV and the doors were open, she heard Ms. DV tell claimant they would place her as soon as they had something and after she brought her doctor's release in. However, she said it would be customary for job applicants to leave

Company A with their SOQ, whether they had been hired or not, because "that is their personal information."

Ms. S said the standard procedure, when a job order comes in, is to contact a person from the "hot list," tell them to go out with their security clearance paperwork and interview with a Company B supervisor, and to call the supervisor to say the person was coming. Following that interview, if the supervisor approved of the person, he or she would call Company A to have them "put into the system," which formally occurs around 24 hours later (pending the results of the drug test). Until that point, she said, they do not become Company A's employee. She maintained that that had not happened in this case; that claimant was never sent to Company B and that Mr. H had later told her he had taken claimant to Company B because he knew of a job opening there. In her opinion, claimant had never been hired by Company A.

Ms. S said the first she knew of claimant's going to work at Company B was when a paycheck was issued for her. When claimant came in the next day to pick it up, Ms. S asked her why she was at Company B, and who had authorized her going to work there. She said claimant replied that she thought she had been okayed to go to work. Ms. S said she put in a call to Ms. N the same day. However, Company A issued claimant a second check thereafter because, Ms. S said, "[w]e felt like that we were obligated to pay her for working . . . and [Company B] wasn't taking responsibility for it."

Pursuant to a written contract between the two companies, Company A issued checks to employees such as claimant, and was reimbursed by Company B for their wages, plus 30 percent. Ms. S said the 30 percent was meant to include, among other things, premium for the workers' compensation insurance Company A had agreed to furnish its employees. Ms. S stated that she subsequently tried to return this money to Company B, but that they would not accept it.

(Ms. I), Company B's office manager, said her understanding of the hiring process was that when Company A sent someone out for an interview "the process had been done at their office . . . once they had been brought out for the interview, that the process had been cleared, and they were to be put in the system." However, she stated that the hiring decision doesn't come from Company B but rather that Company A, upon receiving positive feedback from Company B's supervisors, "initiates them to be put in."

The contract, executed July 13, 1990 by the two companies, provided that Company A would provide initial placement of Company A employees on a temporary-to-permanent basis and provide additional temporary personnel on request. It stated that all employees must have completed all of a list of documents and forms prior to placement. Company A agreed to pay social security taxes, withhold income tax, and "meets (sic) requirements for unemployment insurance and workers compensation." The contract further provided for the straight payment of 30 percent based on the employee's hourly rate times the number of hours worked. It also stated a policy that all personnel placed by Company A must work

60 calendar days before they could be considered for permanent placement with Company B. No part of the contract addressed which party had the right to control and direct the work of personnel. The contract also provided that it was to be effective for a 12-month period, until July 12, 1991, although Ms. S stated that the contract was in effect during the period of time covering claimant's injury.

In reaching his decision that claimant was an employee of Company B and that Carrier B thus is responsible for providing workers' compensation coverage for this claim, the hearing officer made certain findings of fact, including that Company A had no actual knowledge that claimant had begun work with Company B on September 2, 1991; that Company A had actual knowledge that claimant was employed under their placement arrangement with Company B on September 6; that claimant continued to work under the terms of the employee placement arrangement between Companies A and B; that Company B submitted time cards to Company A for claimant's services, and Company A paid claimant and billed Company B wages plus 30 percent; that the written agreement, although expired by its own terms, continued to be recognized as a valid placement arrangement by both Company A and Company B.

The hearing officer made other findings of fact as follows:

Findings of Fact

16.The written employee placement arrangement did not contain any provisions dealing with the control and direction of an individual employee after the employee began performing duties for [Company B].

17.Claimant's work activities were under the control and direction of [Company B].

18.Claimant fell and injured her back while at work on (date of injury).

The hearing officer also made certain conclusions of law as follows:

Conclusions of Law

2.[Company B] had functional control over the claimant's work activities.

3.[Company B] was the employer of claimant for the purpose of workers' compensation coverage on (date of injury).

4.[Carrier B], the insurance carrier for [Company B], is the correct carrier responsible for the workers' compensation claim of claimant on (date of injury).

Carrier B contends that equity considerations should have been given greater weight in this case, and that Company A should be estopped from providing any evidence or

defense which would be counter to a finding of fact or conclusion of law that claimant was an employee of Carrier A. In so arguing, Carrier B invokes the doctrines of quasi-estoppel, equitable estoppel, judicial estoppel, and waiver. Carrier B notes that Company A, after learning that claimant was working with Company B, proceeded to issue her a second check and send an invoice to Company B, payment of which it accepted. Company B, it maintains, was misled to its detriment by these actions; if it had not been misled, it could have sent claimant back to Company A and requested an employee hired through proper procedures. Such also demonstrates Company A's waiver of any right to assert claimant was not its employee. Carrier B also contends that Company A, through its representatives' testimony, demonstrated that it would have treated the situation differently had claimant not been injured. Further, it says, the great weight of the credible evidence shows that Company A in fact sent claimant to Company B.

Without going into the legal distinctions between the forms of equitable relief sought by Carrier B, we find that none of Carrier B's arguments causes us to reverse the hearing officer's decision. Whether the employer-employee relationship exists is a question of fact. Holsworth v. Czeschin, 632 S.W.2d 643 (Tex. Civ. App.-Corpus Christi 1982, no writ). The key issue in such cases is who possesses the right to control the details of the worker's performance. Texas Employers Insurance Co. v. Bewley, 560 S.W.2d 147 (Tex. Civ. App.-Houston 1977, no writ). Where two potential employers are not operating under a contract that expressly assigns right of control, a court must review the facts of the particular case to determine which entity had the right to control an employee's activities. Producers Chem. Co. v. McKay, 366 S.W.2d 220 (Tex. 1963). The intent of an entity, either express or implied by its actions, may have no bearing on this ultimate issue. *See* Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991.

The facts of the instant case are similar to those in Archem Co. v. Austin Industrial, Inc., 804 S.W.2d 268 (Civ. App.-Houston [1st Dist] 1991, no writ), which also involved a temporary labor company and its client company. The court, in reversing the lower court's summary judgment in favor of the temporary company, said the contract between the two was little more than a fee schedule, and that a real issue of fact existed regarding who actually exercised control over the employee's work. The court also said the temporary company's "gratuitous" providing of workers' compensation benefits was irrelevant.

As with the Archem case, this case presented a series of facts for the hearing officer to resolve and determine. These facts included those upon which Carrier B relies in making its equitable arguments. There is no indication that the hearing officer did not take such facts into consideration in reaching his decision. With regard to Company A's action in issuing claimant a second check and invoicing Company B, we observe the Archem court's determination that an employer's post-accident conduct is irrelevant to the issue of right of control. *Id* at 270. The same is true with regard to Carrier B's argument that Company A hypothetically would have handled the situation differently had claimant never reported an injury. While this case admittedly involved a series of miscues and misunderstandings that both potential employers would undoubtedly wish to correct in hindsight, that fact alone--nor

any actions taken by Company A in conformance therewith--cannot override the basic fact that Company B controlled and directed the work of claimant.

In addition to its equitable arguments, Carrier B challenges the findings of fact and conclusions of law cited above. It objects to the characterization, contained in Findings of Fact Nos. 5 and 6, of Company B "hiring" new workers and claimant "applying for employment" with Company B. Likewise, it objects to Conclusions of Law Nos. 3, 4, and 5. Given the hearing officer's ultimate determination that claimant was the employee of Company B, these findings are not inconsistent and are supported by sufficient evidence in the record, based upon the hearing officer's determination of the right of control. With regard to the conflicting evidence about whether Company A had sent claimant to Company B, the hearing officer was entitled to believe one witness's testimony over another's. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Carrier B also objects to Findings of Fact Nos. 16 and 17, which go to the issue of control and direction, on the grounds that equitable considerations were not considered. As noted earlier, Carrier B's equity arguments were based on facts in the record to which the hearing officer was entitled to give greater or lesser weight. While we do not hold that equitable considerations have no place in determining the employer-employee relationship, cf. Texas Workers' Compensation Commission Appeal No. 92035, decided March 12, 1992, we have reviewed the entire record in this case, and we accordingly hold that the hearing officer's findings are based on sufficient evidence.

Finally, Carrier B objects to Finding of Fact No. 18, regarding the circumstances and nature of claimant's injury, arguing that the question of injury was not an issue at the contested case hearing. We agree that, while the rephrased issue concerning the identity of claimant's employer mentioned a (date of injury) back injury, this was not tried as an issue before the hearing officer, either expressly or by consent. This finding thus was not necessary to the hearing officer's decision and, as it relates to a matter not in dispute, may be disregarded. *See* Texas Workers' Compensation Commission Appeal No. 92056, decided April 3, 1992, and citation therein.

In sum, we find that the hearing officer's decision was based on sufficient evidence. Unless the findings, conclusions, and decision of the hearing officer are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, there is no basis in law or fact to disturb that determination. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge