APPEAL NO. 93564

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on May 24 and 25, 1993, in (city), Texas, before hearing officer (hearing officer). The four issues before the hearing officer were whether the claimant was an independent contractor or an employee on the date of injury; the identity of the person for whom the claimant was working on the date of injury; whether the person for whom the claimant was working on the date of injury had workers' compensation insurance coverage and, if so, with what carrier; and whether the claimant has had disability. The appellant, hereinafter carrier, appeals the hearing officer's determination that the claimant was an employee of (employer), on the date of injury and contends he was instead an independent contractor who was performing personal work for two individuals on the date in question. The carrier also alleges error in the hearing officer's refusal to allow one of carrier's witnesses to testify at the hearing. There was no response filed by the claimant.

DECISION

We reverse the decision and order of the hearing officer and render a new decision that the claimant was not an employee of (employer), on the date of injury, (date of injury).

The claimant's position at the hearing was that he was an employee of (CPA), which carried a policy of workers' compensation insurance. (Testimony showed that CPA, a partnership, had dissolved following the illness and retirement of its principal, (RB). The business was subsequently incorporated in January 1991 as DB (PC), which continued the workers' compensation policy.)

The claimant testified that approximately six and one-half years ago he had been hired by (JB), wife of RB, to do maintenance work primarily on residential rental property which was owned by a number of partnerships in which RB was a partner, including RDR (business) , and (business). (He said he also did repair and maintenance work, to a lesser degree, on commercial and personal property owned by the Bookers.) Claimant's working relationship with JB began when she asked him, as one of her tenants, if he would paint a house for her in exchange for rent. He said that because she liked his work she asked him to work for her full time, but on a contract basis. He said he did not understand at the time what that meant. Claimant said he was told by the Bookers that there was more incentive for him to work if he was paid by the job rather than put on a regular salary. Claimant said, however, that he was paid by the hour when he did "make-ready" work on a vacant house. No amounts were ever deducted from his pay for Social Security or federal income tax.

Claimant said it was JB's regular practice to give him a list of jobs to do every week, and one such list was made part of the record. He said she also would frequently call him and add jobs to the list, sometimes taking him off one job to do another. Claimant invoiced JB for each job, and was paid, usually by check drawn upon the accounts of the various entities. (Check stubs in evidence show payment from CPA.) Claimant said he used his

own tools to do the work, but was sometimes advanced money to cover materials. He said that while he did some "moonlighting" at other jobs, it was with JB's permission, as she wanted him to give her work first priority. (Claimant had a dba, "Helper Maintenance," and copies of invoices under that name were made part of the record. However, claimant said he did very little work for other people.) While JB did not supervise him while he did the actual work, claimant said she told him where and when to be on a job, gave him deadlines, and "directed his every move." He said she also told him when she wanted him to bring helpers, but that she did not want just anyone on the properties.

Claimant said he had been under the impression from JB that he had workers' compensation coverage in his job. A signed statement by claimant's former wife, which was made part of the record, stated in part as follows: "Approx. 1987, I asked [JB] who was her insurance agent for the companies. She told me we did not need insurance because if [claimant] or I was hurt on one of her properties, her insurance would cover us, because of the type of work [claimant] did for her, roofs especially. The insurance company did not consider [claimant] a contractor, they considered him an employee."

Claimant's injury occurred on (date of injury), when he went to a farm which was RB's and JB's personal property to move a fence because of a border dispute. The claimant said the tools he used that day--including a truck, post hole digger, hammer, hoe, rake and wheelbarrow--were those which were at the farm and belonged to RB. At JB's instruction to get his brother or someone to help, claimant said he brought his brother along as a helper. Apparently claimant and his brother were paid $200 apiece for this work, although claimant could not recall the manner in which payment was made. Also at JB's instruction, he arrived and began work at 9:00 a.m. Claimant said his back hurt after doing the work, and the next morning when he coughed he felt a disk rupture. After a few weeks of back pain he sought medical attention and ultimately underwent a lumbar laminectomy and disk excision in May of 1992. He said his medical bills had been covered by his former wife's health insurance policy.

JB testified that she was never an employee of CPA, which was a tax and accounting firm owned by her husband RB and his two sons. She said that when RB suffered a heart attack in February of 1990 and subsequently retired, CPA was dissolved and became PC, JB said she managed the real estate which was owned by the above-mentioned partnerships which themselves had no employees. She said claimant was paid solely by the job and never by the hour, that his pay varied according to each job, that he furnished his own tools and purchased the materials needed, and his own helpers when necessary. She denied that she told claimant when to start and stop work or when to take breaks.

With regard to claimant's understanding that he was covered by workers' compensation insurance, JB said the partnerships have landlord/tenant liability insurance policies covering the properties, and said that if she ever referred to claimant's being covered if hurt on the job, that had to have been what she was referring to. She said those policies were the only insurance the partnerships had.

JB also said claimant did personal work for her and RB, and that claimant was

working for them in a personal capacity on the farm when he was injured. She believed the claimant had been paid for this job by personal check. She said CPA did not own or manage any real estate; the reason some check stubs were in the name of that entity was because CPA had one account which was for rental property owned by RB personally. She acknowledged, however, that one check had been issued on a CPA account for trash removal at a building which was owned by the partnership of B and S, with office space leased to CPA.

(DB) stated that PC was formed January 1, 1991, after CPA was dissolved. He said claimant was never an employee of either CPA or PC, both of which carried workers' compensation insurance, and neither of which was involved in any real estate business. Neither did PC or CPA have any ownership interest in the farm on which claimant was injured. He said both CPA and PC were public accounting firms employing tax preparers, bookkeepers, and support staff; it currently uses a janitorial firm which does not employ claimant. DB said he is a partner in the entities RDR and B and S, but that neither has any employees and they do not carry workers' compensation insurance.

The hearing officer stated in her discussion that the evidence showed the claimant was not a "building and construction" independent contractor, since he did not meet one of the three required criteria, i.e., he was not "free to hire as many helpers as he desire[d] and to determine what each helper will be paid." Article 8308-3.06(b)(2)(B). She also said that he did not appear "to meet the four required criteria for independent contractors set out in Art. 8308-3.05, since the evidence is persuasive that he did not act as the employer of any employee by paying wages [or] directing activities; he was not required to furnish necessary tools; finally, he was not free to determine the manner in which the work was performed. Art. 8308-3.05(a)(1)(A), (B), (C)."

The hearing officer also said the evidence was persuasive that the claimant worked for RB and JB, who did business as five partnerships, among them the entity CPA. She went on to state that although CPA dissolved on December 31, 1991, its name remained on the policy of workers' compensation insurance until June 2, 1992, and its letterhead was used by DB on February 2, 1993, when he wrote the Texas Workers' Compensation Commission to deny that claimant was employed by CPA. Although the claimant was working on RB and JB's private residence when injured, the hearing officer said, the "temporary direction" exception appears to apply, bringing the injury into the course and scope of employment for CPA. The hearing officer further noted that the policy of insurance reflects that CPA was the named insured until June 2, 1992, and the Commission's coverage record for CPA shows coverage as of the day of the hearing with no indication of notice of withdrawal, cancellation, or termination; and failure to notify the Commission of withdrawal, cancellation, or termination extends the coverage until the required notice is given. Article 8308-3.26.

The 1989 Act limits liability for compensation to one who is an employee, defined in part as a "person in the service of another under any contract of hire, whether express or implied, or oral or written." By definition, the term excludes an independent contractor. *See* Article 8308-1.03(18). Whether an individual is an employee or an independent contractor

depends upon whether the purported employer has the right to control the individual in the details of the work to be performed versus as to the end result desired. Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964); Texas Employers Insurance Association V. Bewley, 560 S.W.2d 147 (Civ. App.-Houston [1st Dist.] 1977, no writ). Texas courts have listed many indicia of independent contractor status; for example, it has been held that a person who performs work requiring a special skill, furnishes all his own tools, is working according to a predetermined plan, who can come and go from work at times within his discretion, is paid by the job, and who is not carried on payroll, social security or income withholding rolls of another, may be an independent contractor for purposes of workers' compensation. Anchor Casualty Co. v. Hartsfield, 390 S.W.2d 469 (Tex. 1965).

The Act contains two sections concerning its application with regard to independent contractors, each containing its own definition of that term. The broader of the two, Article 8308-3.05, describes the relationship between most general contractors and independent contractors. The more specific Article 8308-3.06 applies only to contractors and workers constructing or repairing certain residential or small commercial structures and their appurtenances. The hearing officer found that the claimant was not an independent contractor under either section. We find it unnecessary to address in detail whether and to what extent the claimant met either statutory definition, as our review of the record discloses that the overwhelming weight of the evidence shows that the claimant had no express or implied contract of hire with CPA or PC.[1] Carnes v. Transport Insurance Co., 615 S.W.2d 909 (Tex. Civ. App.-El Paso 1981, writ ref'd n.r.e.). Neither, the great weight of the evidence shows, did CPA or its successor possess any right of control over claimant--the "supreme" test for determining an employer-employee relationship. Newspapers, Inc. v. Love, *supra*.

The hearing officer concluded that, on (date of injury), the claimant was an employee of RB and JB, doing business as CPA, and stated that the claimant worked for RB and JB, "who did business as five partnerships, among them [CPA]." Our review of the record shows this conclusion is not supported by the evidence. Both claimant and JB testified that JB originally hired claimant and was the person with whom he dealt and who assigned work to him. The evidence further showed that JB was acting in the capacity of a property manager for those partnerships which owned real estate and that she was not employed by CPA, which was a public accounting firm with no real estate holdings. The work claimant performed was maintenance of the partnerships' residential property, with some occasional work on commercial or private property, none of which was connected with CPA. The only evidence of any connection between CPA and claimant were those check stubs which showed payment for work at certain stated properties and for trash removal at the building leased by CPA. However, the uncontroverted testimony was that one of CPA's accounts was used to pay for work on certain residential property owned by RB personally, and on

[1]Because the Act defines "employer" to include a person who has workers' compensation insurance, and because it was uncontroverted that none of the other entities involved in this case had such insurance, we do not need to address the nature of claimant's relationship with any of those entities.

one occasion to pay for the trash removal at the building owned by Booker and Sons but not by CPA. JB testified that this account had been closed out some time after her husband retired from CPA. Further, at the time claimant was injured he was doing work of a personal nature on property owned directly by RB and JB, in which CPA had no ownership interest. Also at that time CPA had been dissolved and RB had retired. In view of the foregoing, we find the hearing officer's findings and conclusions with regard to claimant's status as an employee of CPA to be so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951).

Finally, the carrier alleges error in the hearing officer's failure to allow RB, who had not been identified as a witness pursuant to Article 8308-6.33(d), to testify as an impeachment witness. While not necessary to this decision, given our holding on the merits, we find that the hearing officer did not abuse her discretion in determining, in essence, that the carrier failed to establish good cause for its earlier failure to identify RB. *See* Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992.

The decision of the hearing officer is reversed and a new decision rendered that the claimant, on the date of his injury, was not the employee of Roy Booker and Associates, CPA.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Thomas A. Knapp
Appeals Judge

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Gary L. Kilgore
Appeals Judge