APPEAL NO. 93805

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). At a contested case hearing held in (city), Texas, on August 4, 1993, the hearing officer, (hearing officer), considered the sole disputed issue, that is, whether the appellant (claimant), a truck driver, was, as he contended, the employee of (Company A) on (date of injury), the date of his undisputed injury. Respondent (carrier) was the workers' compensation insurance carrier for Company A on the date of claimant's injury. The hearing officer concluded that claimant was the employee of (Mr. G), a non-subscriber to workers' compensation insurance, pursuant to an agreement between Company A and Mr. G. The hearing officer also found that Mr. G had, and exercised, the right of control over the details of claimant's work. Claimant requests our review challenging the sufficiency of the evidence to support the hearing officer's decision. Claimant asserts that notwithstanding the written agreement between Company A and Mr. G requiring Mr. G to act as employer, it was Company A that exercised control over claimant and thus became his employer. Claimant also points to certain documentary evidence as showing that Company A was his employer. In its response, the carrier urges affirmance asserting that Mr. G became claimant's employer not only by the terms of the agreement with Company A, but also because Mr. G exercised direct and actual control over the details of claimant's work.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusion, we affirm.

A response to claimant's request for review was also filed by Company A urging our affirmance and stating that it was permitted to participate in the hearing below pursuant to the "Employer Bill of Rights." *See* Section 409.011. While Company A was permitted to participate in the hearing in its effort to resist being found to be the employer, it was not a party to the proceeding below and, hence, has no standing in this appeal. *See* Texas Workers' Compensation Commission Appeal No. 92508, decided October 5, 1992. Accordingly, Company A's response is not considered.

On (date of injury), claimant drove a truck owned by Mr. G doing business as (Company B), which was leased to Company A, to deliver a crane boom for a Company A customer. While walking on rocky ground at a truck stop to adjust the trailer outriggers after the delivery, claimant fell injuring his right elbow. Mr. G testified he had accompanied claimant on the delivery because it was, in his words, "a tricky job" and he wanted to ensure claimant did it correctly. He even had claimant chain the boom differently. He witnessed claimant's fall. Claimant continued to work at Company B's terminal until sometime in late January or early February 1993 at which time he sought medical attention for his elbow and was advised surgery was indicated. He brought the matter to Mr. G's attention first as he regarded Mr. G as his "immediate supervisor," and was advised by Mr. G that he was the employee of Company A and to contact that concern. Claimant said he then contacted Company A and was advised he was "not covered" on (date of injury) because he had not

then yet been "approved" by Company A as a driver, and that he was not approved and assigned a Company A driver's number until late December 1992 after he underwent a drug screen test. Mr. G testified he went "into orbit" at that revelation as he had regarded claimant as the employee of Company A from the outset of claimant's employment on October 10, 1992. Claimant, too, testified that he had regarded himself as Company A's employee from the outset.

Claimant's TWCC-41 form (Employee's Notice Of Injury Or Occupational Disease And Claim For Compensation) was dated February 10, 1993, and reflected Company A as his employer at the time of his injury. The carrier's TWCC-21 form (Payment Of Compensation Or Notice Of Refused/Disputed Claim), dated March 1, 1993, disputed the claim on the basis that claimant was not an employee of Company A on the date of his accident but rather was the employee of Mr. G, the "owner-operator of truck who signed agreement requiring owner-operator to assume responsibilities of an employer." Attached to the TWCC-21 form was a TWCC-82 form (Agreement To Require Owner-Operator To Act As Employer) (hereinafter TWCC-82 agreement) signed on October 1, 1992, by Company A as "Motor Carrier" and for Mr. G as "Owner Operator." The TWCC-82 agreement stated the parties' agreement "that the Owner Operator assumes the responsibilities of an employer for the performance of work." It stated the term of the agreement to be from October 1, 1992, to October 1, 1997, and the "estimated number of workers affected" as "3." Although claimant did not apply for the employment until October 7th, Mr. G testified that the three workers he viewed as "affected" were himself, DK, and the claimant. Claimant said he was unaware of the agreement. Notwithstanding his testimony that he had been in the trucking business for 14 years, that he then owned and operated four trucks, three which he had leased to Company A, and that he had entered into the TWCC-82 agreement with Company A, Mr. G nonetheless testified, as did the claimant, that he regarded both himself and claimant to be employees of Company A. Mr. G stated that claimant was hired by Company A to drive for Company A, that he thought the agreement meant that Company A would provide workers' compensation insurance, and that he did not understand the agreement.

Claimant testified and the documentary evidence reflected that on October 7, 1992, at Mr. G's truck yard in (city), Texas, claimant completed a "Driver's Application For Employment" form which had Company A's name written in at the top, and that he was interviewed by Mr. G's dispatcher, (Mr. R). Mr. G said the applications were kept at his office with the Company A name already filled in at the top. Claimant said he was also interviewed by (Mr. M), whom he described as the manager of Company A's (city) #23 terminal in (city), Texas. Claimant described that terminal as simply a trailer house and said Mr. G's terminal contained a truck yard, maintenance bays, and an office. As part of his employment application, claimant said that he was asked to provide a physical exam and drug screen test, that he obtained copies from the doctor who had examined him for his previous employment, and that he provided them to Company A. He said he knew he could not be approved as a truck driver without those documents and a check of his driver's license. In the meantime, he was first assigned to drive an interstate run, on October 17th, by Mr. M who was then at Mr. G's terminal. After that run, he drove a number of runs in

October and November including the (date of injury) run when he was injured. After being advised by Company A that he still had not provided a drug screen test, claimant submitted a specimen on December 11th to a laboratory and the laboratory sheet reflected it was a "pre-employment" test.

Claimant and Mr. G testified, variously, that three of Mr. G's four winch trucks were leased to Company A and transported goods for Company A's customers, that the truck claimant drove on the day of his accident was leased to Company A, that all the trucks claimant drove were owned and maintained by Mr. G and kept at Mr. G's yard, that claimant was assigned his runs by Mr. G, that Mr. G directed claimant's activities after receiving a dispatch from Company A, that all the runs originated from Mr. G's yard, that while on his runs claimant checked in with Mr. G, that he obtained his waybills and driver's daily logs at Mr. G's office and turned them in to Mr. G, and that while Company A provided claimant with funds to cover his road expenses when driving, such advances were deducted by Company A from its settlements with Mr. G, that Mr. G paid claimant weekly for his driving, either in cash or by Company B checks, from the monies Mr. G received from Company A, and that Mr. G had negotiated a flat weekly salary with both the claimant and another person, GH. Claimant also said that on an occasion in (date) when he was ticketed for various violations of trucking laws, including the truck lease to Company A not being on file with the Texas Department of Public Safety, he gave the ticket to Mr. G. When not driving a truck, claimant said he performed welding and various tasks for Mr. G around the latter's truck yard for which he was paid by Mr. G.

The settlement sheets prepared by Company A reflected the amounts paid by customers for the trucking deliveries and the amounts thereof owed Mr. G by Company A together with various deductions including amounts for "workman's comp." Mr. G testified he believed such deductions signified that Company A provided workers' compensation coverage for claimant or whichever driver made the runs, notwithstanding the TWCC-82 agreement.

Claimant stated that he was advised by Company A that he was "not covered" on the date of his accident because he had not yet been "approved" by Company A as a driver. Mr. G testified he did not know that claimant had not yet been "approved." According to (Ms. Y), a Company A official, "approval" by Company A of drivers required a physical exam, a drug test, an employment background check, and a motor vehicle report, and while Company A had received claimant's most recent physical exam, it had apparently not received a copy of claimant's most recent drug test accomplished for his prior employer. Claimant was required to undergo another drug test in December 1992 and thus his "approval" as a driver was delayed until late December 1992 at which time he was assigned a driver number. It was not disputed that Mr. G and Company B did not have workers' compensation insurance at the time of the injury.

Ms. Y testified that Company A had to "qualify," pursuant to U.S. Department of Transportation regulations, any driver who was to drive a Company A truck (apparently referring to its leased trucks) no matter which entity employed the driver. She said that

when a driver fills out an application it does not necessarily mean the applicant is going to be a Company A employee and appeared to say that Company A did not actually "hire" drivers, as such, but rather "qualified" or approved them for their actual employers such as PRM, the leasing company currently used by Company A to employ drivers. If approved or qualified by Company A, a driver applicant would have to complete still another application to be employed by the leasing company and Ms. Y said that claimant's application never got that far. She also stated that when Company A ceased hiring drivers and began using a leasing company, it still maintained its computerized driver identification numbers system to identify drivers. She said that all owners and operators as well as the drivers who were employed by PRM were covered by that entity's occupational accident insurance and that the listing of a deduction for "workers comp" on the settlement sheets instead of the occupational accident insurance simply reflected Company A's failure to change the computer program.

The hearing officer found, among other things, that Mr. G and Company A entered into the TWCC-82 agreement, that it was undetermined whether the agreement was filed with the Texas Workers' Compensation Commission (Commission) but that the failure to so file did not invalidate it, and that Mr G "had the right of control and exercised the right of control over the details of claimant's work on (date of injury)." The hearing officer concluded that claimant was the employee of Mr. G on the date of his injury pursuant to the TWCC-82 agreement.

As the Appeals Panel observed in Texas Workers' Compensation Commission Appeal No. 92648, decided January 29, 1993, independent contractors are not included in the definition of "employee" and such is reflected in the provisions of the 1989 Act pertaining to the concepts of "motor carrier" and "owner operator." *See* Sections 401.012 and 406.121(2), (3), and (4). Section 406.121(4), which defines "owner operator" as a person providing transportation services under contract for a motor carrier, provides that an owner operator is an independent contractor. Section 406.122(a) provides, in part, that for purposes of workers' compensation insurance coverage, a person who provides a service for a motor carrier who is an employer is an employee of that motor carrier unless the person is operating as an independent contractor or is hired to provide the service as an employee of a person operating as an independent contractor. Section 406.122(c) provides that "[a]n owner operator and the owner operator's employees are not employees of a motor carrier for the purposes of this subtitle 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."

In Appeal No. 92648, *supra*, we stated: "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. (Citation omitted.) The right of control of a servant is usually a question of fact. (Citation omitted.) 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. (Citation omitted.)" The evidence in this case sufficiently supports the findings that Mr. G not only had the right

of control but indeed exercised the right of control over the details of claimant's work. Mr. G entered into an agreement with Company A which required him to act as employer and Mr. G said that claimant was one of the three employees the agreement encountenanced. The agreement was on a Commission form and met the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 112.102 (Rule 112.102), except for the omission of the motor carrier's federal tax identification number. We have previously observed that such omission is not invalidating. Texas Workers' Compensation Commission Appeal No. 92134, decided May 20,1992. The hearing officer, as the fact finder and sole judge of the weight and credibility to be given the evidence, was free to find that Mr. G made the agreement notwithstanding his testimony that he did not understand its implications concerning claimant's status as his employee. Further, both claimant and Mr. G testified at length to facts which clearly showed that Mr. G, and not Company A, exercised control over the details of claimant's work.

We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge