APPEAL NO. 93901

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. art 8308-1.01 *et seq*.), a contested case hearing was held in (city), Texas, on August 26 and 31, 1993, (hearing officer) presiding as hearing officer. He determined that the respondent (claimant) was an employee of the employer who had workers' compensation coverage by appellant (carrier), and that the claimant had disability since January 18, 1993, based upon his compensable injury of (date of injury). Carrier appeals faulting several of the hearing officer's findings of fact and conclusions of law as not being supported by any, or alternatively, insufficient evidence. No response has been filed.

DECISION

Determining the hearing officer failed to make necessary findings and incorrectly applied the law to the facts of this case, we reverse and remand.

This case involves the vagaries that frequently accompany cases concerning small or limited construction contractual arrangements and injuries occurring during the construction project. As might be anticipated, there was much conflicting and sometimes inconsistent evidence and testimony. The hearing officer, as the fact finder and sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence (Section 410.165(a)) is the one to resolve those conflicts and inconsistencies. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We have firmly held that we do not substitute our judgment for that of the hearing officer if there is some probative evidence supporting his factual determination and it is not against the great weight and preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 92155, decided June 4, 1993.

That the claimant fell from a second story of a building under construction and sustained an injury to his back is not in issue. That he suffered disability as defined in the 1989 Act (one of the two issues at the hearing) as determined by the hearing officer is supported by evidence that can be found sufficient. The evidence consisted of a medical report of the doctor the claimant saw several days following the incident and the testimony of the claimant. A statement from (Dr. J) dated January 18, 1993 provided:

(Claimant) reported to our office complaining of low back and leg pain. Examination and x-ray reveal a diagnosis of sciatica with disc/displacement. Based upon my findings I feel that further treatment is necessary. At this time, (claimant) is unable to work. Our office will keep you updated on (claimant's) condition.

The claimant testified that he was limited in getting medical treatment because the carrier refused payment. He also testified that he had been and still is unable to work because of the injury. While this evidence of continuing disability may not be overwhelming, it is sufficient to support the hearing officer's determination. We have held that the testimony of a claimant alone can be sufficient to establish disability. Texas

Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992.

Turning to the central issue in the case, that is, the claimant's status as an employee of an independent contractor or the employee of the employer covered by carrier's workers' compensation policy, the evidence is in considerable conflict. Briefly, the claimant, a carpenter with very limited English language abilities, along with his brothers had worked for (N & D) at various times over the last couple of years. His status, and that of his brothers, had apparently always been as an hourly employee. In January 1993, N & D obtained a subcontract on an apartment complex and called various people who had worked for them in the past. Claimant's brother (R) (apparently the more fluent in English and the spokesman for the brothers) got a call and talked to one of the N & D partners, (F) (there was no evidence that any of the other brothers were called or talked to). R and F gave varying descriptions of the conversation: R indicating that the arrangements were for he and his brothers to go to work for hourly wages as before and F testifying that R chose to be an independent contractor and to be paid on a square footage basis for framing and other carpentry functions.

At the January 8, 1993, meeting of R and F, both signed a Texas Workers' Compensation Form-83 which had the box checked for "Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers." When asked about this form, R testified that he could not read English and that he did not know what he was signing. F testified that they had discussed in some detail the job, the form, and workers' compensation coverage and that R selected the square footage option. According to the testimony of F, the claimant never signed any agreement that he was or was not an employee of N & D and prior to January 1993 project, he had always been an N & D employee when working their construction projects. Although the brothers worked on the project for over a week, they did not complete the project because a request by R for more money was denied by N & D. (Before they left the project, the claimant had fallen and injured himself). According to the testimony of R, the request was for a greater hourly rate for the brothers and according to F, the request was for a greater square footage rate. An offer of two cents more per square foot was rejected by R according to one of the N & D partners. In any event, no agreement was reached and the brothers left the project (the claimant not having returned following his injury several days earlier).

The Form-83, although signed on January 8th, was not filed with or received by the Commission until February 2, 1993, sometime after the brothers had ceased working for N & D. The form also provides on its face that it was to take effect upon receipt by the Texas Workers' Compensation Commission. Consequently, Section 406.145(a) which provides that if a "joint agreement is signed by both the hiring contractor and the subcontractor and filed with the commission, the subcontractor, as a matter of law, is an independent contractor and not an employee," did not become operative. That is not to say the form cannot be considered as an item of evidence in the overall determination of the claimant's status.

R, another of the brothers, and the claimant all testified that while they had some of

their own tools (hammer, tape measure, square, pouch), N & D provided other of the tools or equipment needed for the job such as an air hammer, air compressor, and forklift. They also testified that all the supplies were provided by N & D, and that N & D partners supervised the details of their work. The claimant indicated he did not speak English and R would translate any instructions given to them by the partners. He also testified that N & D did not tell him how much he would get an hour and that R was the one who paid him from the money N & D gave to R. On the other hand, testimony of the N & D partners indicated that they did not supervise the details of the brothers' work but rather only checked regularly to be sure the project was going along timely and work was being done correctly. R denied that the claimant ever worked for him. The N & D partners stated that R headed up the crew that the claimant was a part of, that R could follow the project drawing although they would give him some specific instructions occasionally, and that they communicated satisfactorily with R. F also testified that R had about "six guys" working for him, that R determined who would work for him and was advised, he, R, would have to do the hiring. F stated that nothing was mentioned about being restricted to work only for N & D. Two checks were introduced which were payable to R, one dated January 15th (the day after the claimant's injury) and another a week later. N & D indicated that these were the only payments for the work done by the brothers and that they had not been paid individually. There apparently were no records to indicate what square footage the check was supposed to represent. F testified that N & D did not keep track of any hours worked by the brothers and that they came to the project and left at different times and that N & D's concern was only the timely completion of the job, not what hours were worked. R acknowledged that he didn't have any set hours when he worked on the project. R stated he was always paid by the hour and that he would divide up the check based upon the others' hourly pay rate although he wasn't clear on how he knew their hourly rate.

The hearing officer indicated that under the common law tests, R and his brothers were employees of N & D, and that the mere fact that they were being paid by the square foot was not sufficient to make them independent contractors. The hearing officer also noted that the method of work and degree of supervision was unchanged from previous jobs where the brothers were employees. The findings of fact that the carrier urges are not based on any evidence or insufficient evidence are:

6.(F) was present on the construction site on (date of injury), at the time of the Claimant's injury and was exercising supervision over framing tasks.

7.During the days preceding (date of injury), and on (date of injury), (F) supervised (R) and exercised employer like controls by drawing on the floor the locations of joists that were to be installed, by supervising the providing of joists by forklift to (R) and other framing carpenters, and by providing nails, an air compressor and a nail gun to (R) and other framing carpenters.

9.(R), prior to January 8, 1993, had not acted as the employer of the Claimant.

10.Prior to January 8, 1993, the Claimant had not performed work for N & D, as the employee of an independent contractor, but had worked for N & D Construction Company as an employee.

We have reviewed the record and find some support for these findings of fact, principally in the testimony of the claimant and his brothers. It is apparent from the record, that because of a language barrier, R was the conduit through which communication and any direction was effected to the claimant and the others. Certainly, there was conflicting evidence, and indeed, the testimony of the partners of N & D was in virtual opposition to much of the testimony of the claimant and his brothers. However, the hearing officer had to sort out the conflicts and inconsistencies and in so doing could believe all, part, or none of the testimony of any witness (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e)) and could accord appropriate weight to the testimony of the claimant whose testimony as an interested witness only raised a factual issue. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ).

What is troubling to us is the conclusion of the hearing officer that on (date of injury), the claimant was the employee of N & D based upon these findings. As we indicated above, we do not determine that his findings on scope of control or furnishing of some tools or equipment are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. (The hearing officer notes in his discussion that exerting employer like controls over an independent contractor is a violation of Section 406.145) However, the controlling criteria for determining the claimant's status does not hinge on such findings or on a violation that may result in sanctions under Chapter 145, Administration Violations. Cf. Appeal No. 92155, *supra*, where the hearing officer's findings on control were discussed in dicta. Rather, the provisions of Subchapter G of the Labor Code (1989 Act), Section 406.142 and Section 406.141, apply. As the hearing officer noted and the evidence supports, this case involves construction of apartments of less than 20,000 square feet. Under this subsection, which is a change in the coverage of workers' compensation "concerning agreements between general contractors and independent contractors which apply only to certain contractors, subcontractors, and employees working in the "small" residential and commercial construction industry," Montford, A Guide to Texas Workers' Compensation Reform, Volume 1, pages 3-5, Butterworth Legal Publishers, 1991, "independent contractor" has a specific definition for this class of persons. Section 406.141 defines independent contractor for purposes of Subchapter G workers as:

a person who contracts to perform work or provide a service for the benefit of another and who:

(a)is paid by the job and not by the hour or some other time-measured basis;

(b)is free to hire as many helpers as desired and may determine the pay of each helper; and

(c)is free to, while under contract to the hiring contractor, work for other contractors

or is free to send helpers to work for other contractors.

While the hearing officer addressed the first criterion in his Decision and Order when he stated that the "mere fact that they (claimant and his brothers) were being paid by the square foot is not sufficient to make them independent contractors," he does not address or make any findings on the other two matters. *See* Texas Workers' Compensation Commission Appeal No. 91087, decided January 16, 1992; Texas Workers' Compensation Appeal No. 91115, decided January 29, 1992. Rather, his final decision appears to rest on other common law based criteria, i.e. scope of control and provision of tools and equipment, which are not included in the definition of an independent contractor for specific purposes of Subchapter G workers. The first qualification for the definition of an independent contractor has been met. The record contains some evidence of the two remaining qualifications (this is not to suggest that further development of the evidence may not be appropriately deemed necessary by the hearing officer); however, there are no findings on either. The case cannot be sustained on the apparent misapplication of the law to the facts and evidence in the case. Accordingly, the decision is reversed and the case remanded for further consideration and development of the evidence, as deemed appropriate by the hearing officer, not inconsistent with this opinion. A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearing, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge