APPEAL NO. 94069

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 20, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were: 1. was the respondent (claimant herein) an employee of (company herein) or an independent contractor at the time of the claimed injury; 2. did the claimant sustain disability from June 8, 1993, through September 15, 1993, inclusive; 3. if so, what temporary income benefits (TIBS) are due for this period. The parties stipulated that if the claimant was found to be an employee of the company the injury was compensable and the claimant had disability from June 8, 1993, through September 15, 1993, inclusive. The hearing officer held that the claimant was an employee of the company and that the claimant was entitled to (TIBS) from June 8, 1993, through September 15, 1993, based on an average weekly wage (AWW) of $252.00. The appellant (carrier herein) filed a request for review disputing a number of findings of fact and conclusions of law of the hearing officer and contending that the evidence established that the claimant was not an employee of the company but an independent contractor. The company also filed a request for review, with a number of exhibits attached which were not placed into evidence at the CCH, also disputing a number of findings of fact and conclusions of law of the hearing officer and contending the claimant was not an employee of the company but an independent contractor. The claimant filed a response protesting the company's attaching to its request for review documents not admitted into evidence at the CCH and arguing that the decision of the hearing officer was supported by sufficient evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm.

There were two witnesses at the CCH--the claimant and the owner of the company. These witnesses provided widely differing versions of the facts. According to the claimant he filled out an employment application and was hired by the company. He testified that the company provided all the tools and paint, set the hours and conditions of the work, and told him where and when to paint. The claimant also testified that he did not bid on jobs and was not free to hire additional workers to assist him. The claimant testified that he was an employee of the company and was injured in the course and scope of his employment on or about (date of injury).

(Mr. R), the owner of the company and appearing as the employer's representative, testified that the claimant was an independent contractor, was paid by the job, and bid for each job he performed. He testified that while the company provided the paint, all contractors like claimant provided their own tools although certain equipment like rigs might be leased by the contractor from the company. Mr. R testified that the company did not withhold federal income or social security taxes from the claimant's remuneration. He

further testified that the claimant was free to hire additional workers to assist him and that claimant had signed a Joint Agreement to Affirm Independent Relationship for Certain Building and Construction Workers (TWCC-83).

The only document admitted into evidence, other than the Benefit Review Conference Report which was a Hearing Officer Exhibit, was the TWCC-83. There was conflicting testimony surrounding this TWCC-83. The claimant testified that his signature appeared on the document, but that he did not understand the document. The TWCC-83 is entirely written in English; the claimant, who testified through an interpreter, stated he could not speak or read English. Mr. R testified that another contractor[1], (Mr. G), explained the TWCC-83 to the claimant; the claimant denied this in his testimony. Mr. R stated that it was his practice to personally file all TWCC-83's when they were completed, although he could not swear to filing claimant's. Both parties agreed that records of the Texas Workers' Compensation Commission (Commission) show that the TWCC-83 in question in this case which was executed in March 1993 was not filed with the Commission until September 1993.

The company attaches to its request for review various checks to the claimant, invoices, another copy of the TWCC-83 which had been admitted into evidence, and an Internal Revenue Form 1099. In their respective and very similar requests for review both the carrier and the company dispute the following Findings of Fact and Conclusions of Law by the hearing officer:

FINDINGS OF FACT

2.The Claimant's Employer on (date of injury), the date of the injury, was [company].

5.The Claimant's wages were $7.00 per hour.

6.The Employer provided all the tools and paint for the Claimant.

7.The Claimant had to abide by the working hours and conditions established by the Employer.

8.The Employer told the Claimant when and where to paint.

9.The Claimant did not bid on jobs with the Employer.

10.The Claimant was not free to hire additional workers to assist him.

[1]Mr. R testified that all painters who worked with the company were independent contractors. According to him the only employees of the company were management, clerical and janitorial.

12.The claimant sustained a compensable injury on (date of injury).

CONCLUSIONS OF LAW

2.The Claimant was an employee of [company], not an independent contractor at the time of the injury on (date of injury).

4.The Claimant is entitled to [TIBS] from June 8, 1993, through September 15, 1993, based on an [AWW] of $252.00.

The first question to be determined is whether we should consider the company's request for review. We have previously held that an employer who is not a party at a contested case hearing lacks standing to file a request for review. *See* Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992, Texas Workers' Compensation Commission Appeal No. 92137, decided May 20, 1992; Texas Workers' Compensation Commission Appeal No. 92479, decided October 26, 1992; Texas Workers' Compensation Commission Appeal No. 92500, decided October 30, 1992; Texas Workers' Compensation Commission Appeal No. 93133, decided May 6, 1993.

In the present case the hearing officer provided the company an opportunity to present evidence but it did not offer evidence or become a party and we cannot consider its request for review.

In reviewing the determinations of the hearing officer we must apply the appropriate standard of appellate review. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the great weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In attacking Finding of Fact No. 2 in which the hearing officer found that the claimant was an employee of the company, the carrier points to the evidence in the record that the

company failed to take federal income or social security tax withholding from payments made to the claimant. The carrier is under the misapprehension that this evidence is dispositive of the issue of employment. It is not for a number of reasons. Section 406.141(2) specifically defines an independent contractor as follows:

'Independent contractor' means 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.

Further, the question of employment status has been held as a matter of law to hinge on the right of control. *See* Archem Company v. Austin Industrial, Inc., 804 S.W.2d 268 (Tex. App.-Houston [1st Dist.] 1991, no writ); Continental Insurance Company v. Wolford, 526 S.W.2d 539 (Tex. 1975); Texas Workers' Compensation Commission Appeal No. 92648, decided January 21, 1993. Thus the question of who is paying the employee is not dispositive of the issue of employment. *See* Texas Workers' Compensation Commission Appeal No. 93733, decided September 20, 1993; Texas Workers' Compensation Commission Appeal No. 92039, decided March 20, 1992; Mayo v. Southern Farm Bureau Casualty Co. 688 S.W.2d 241 (Tex. Civ. App.-Amarillo 1985, writ ref'd n.r.e.). If payment of the employee is not dispositive of employment status, withholding while clearly a factor to be weighed, certainly is not dispositive of the issue of employment as a matter of law.[2] Nor do we find that the failure to withhold constitutes the great weight of the evidence against the finding of the hearing officer, which was based upon the right of control.

[2]There are numerous other reasons withholding is not dispositive. This evidence--lack of withholding--requests in essence that the hearing officer take judicial notice of not only the United States Tax Code, but all applicable Internal Revenue Service regulations surrounding federal tax withholding, without the benefit of expert testimony or even citation to relevant statutes and rules. We have refused to delve into or apply the regulations or definitions of federal agencies in regard to disability to state workers' compensation law. *See* Texas Workers' Compensation Commission Appeal No. 931085, decided December 28, 1993; Texas Workers' Compensation Commission Appeal No. 931117, decided February 3, 1994. We see less of a rationale to do so with federal taxation law. Finally, we are constrained to point out that the failure to withhold under these circumstance is equally consistent with non-compliance with the federal tax laws as with their non-applicability to an independent contractor.

Carrier argues that the evidence does not support the hearing officer's Finding of Fact No. 5 that the claimant's wages were $7.00 per hour. The claimant testified that this was his wage rate. While Mr. R testified to the contrary, this is clearly the type of conflict in the evidence to be resolved by the hearing officer as discussed *supra* and we will not disturb it on appeal.

In regard to Findings of Fact Nos. 6, 7, 9, and 10, which deal with specific elements of the right of control of the claimant's work and which are set out verbatim earlier in our opinion, the argument of the carrier is again that there is evidence in the record contrary to these findings. Again there is evidence in the testimony of the claimant to support these findings. Under the standard of appellate review described above, the resolution of these conflicts in the evidence is clearly the province of the hearing officer and we cannot set them aside on appeal, unless the evidence is against the great weight and preponderance of the evidence, which we do not find to be the situation here.

The carrier disputes the hearing officer's Finding of Fact No. 12 that the claimant sustained a compensable injury on (date of injury). At the CCH the parties stipulated that if the claimant was an employee of the carrier then the injury was compensable. In light of this stipulation, the only question here is the validity of the hearing officer's finding that the claimant was an employee of the company (Finding of Fact No. 2). Indeed, the carrier restates the arguments it made in regard to that finding and we must again reject them for the reasons stated above. The only additional argument made here concerns the TWCC-83. Essentially this argument is that, timely filed or not, the TWCC-83 is evidence of the relationship between the parties which supports the contention that the claimant was an independent contractor and not an employee of the company.

Section 406.145 provides that an agreement to be an independent contractor makes a party an independent contractor as a matter of law if it is signed by both parties "and filed with the commission." Section 406.145(d) provides that the "commission shall maintain a system for accepting and maintaining the joint agreements." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 112.202(c) (Rule 112.202(c)) provides as follows:

> The hiring contractor shall file the agreement by personal delivery, registered mail or certified mail with the commission and a copy of the agreement with the hiring contractor's workers' compensation insurance carrier, if any, within 10 days of the date of execution.

Implicit in the decision of the hearing officer is a finding that the company failed to comply with these requirements to make the TWCC-83 binding as a matter of law. Such an implicit finding is certainly supported by the evidence in this case.

The carrier argues that the TWCC-83 is still entitled to some weight regarding the relationship between the company and claimant. It was the duty of the hearing officer to

determine what weight to give this evidence. Section 410.165(a); Appeal No. 92648, *supra*; Sparger v. Worley Hospital Inc., 547 S.W.2d 582 (Tex. 1977); Newspapers Inc. v. Love, 380 S.W.2d 582 (Tex. 1964). Having done so he determined that the claimant was an employee of the company on the date of the injury. We will not reweigh the evidence and find that the determination of the hearing officer was supported by sufficient evidence.

The carrier's attack on the hearing officer's Conclusions of Law merely rehashes its earlier argument adding only an attack on the credibility of the claimant. To the degree such argument is based upon evidence not in the record, we may not consider it and to the degree that it is based upon evidence in the record, credibility is a matter for the hearing officer. Section 410.165(a); Aetna Insurance Co. v. English, *supra*; National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, *supra*.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge