APPEAL NO. 950075
FILED FEBRUARY 28, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 15, 1994, a contested case hearing was held. With respect to the issues before him, the hearing officer determined that respondent (claimant) was an employee of (employer) on _____, that he sustained an injury in the course and scope of his employment on _____, and that he had disability as result of his compensable injury from June 2, 1994, through September 5, 1994. Appellant's (carrier) appeal argues that the hearing officer's determination that claimant was an employee of employer on _____, and that he sustained a compensable injury on that date are supported by no evidence or alternatively are against the great weight of the evidence. No response was received from the claimant.

DECISION

We affirm the hearing officer's decision and order.

On _____, claimant was driving an automobile that he had picked up from one of employer's car dealerships in (City 1) and was returning it to the employer's dealership in (City 2). The car that claimant was driving had a flat tire and he stopped to change it. After he changed the tire, claimant attempted to start the car to finish his trip to (City 2), but the car would not start. One of the other men who was driving another car back to the dealership got in the car and attempted to start it. As he turned the key, the car lurched backwards, knocking claimant to the ground. Claimant broke his right hip and separated his right shoulder.

Claimant testified that he was contacted by (Mr. O), employer's general manager, about being the lead driver for the dealership in 1993. He was hired to provide transportation services on an as needed basis. Transportation services included dealer trades where he took a car from employer and exchanging it with a car from another dealership and buyouts where a car was purchased from another dealership. He stated that he did not have a written contract of employment with the employer. Claimant testified that when the employer had a job for him, he was contacted either by Mr. O or a salesman and was given the instruction of where and when to go and the type of transaction involved. He also testified that the person who contacted him from the employer would say how many drivers were needed to complete the transaction. Thereafter, he would contact other drivers to accompany him on the run. He stated that he selected the other drivers from a list he had compiled, but that the employer paid him and the other drivers at the completion of each transaction. Claimant said that there were occasions when the employer specifically requested him to use a certain individual as another driver. They received $25.00 for a "local run" one way (under 110 miles) and 12 cents per mile otherwise. Claimant also stated (and the witnesses for the employer

agreed) that he was reimbursed for expenses incurred on the road, including gasoline, meals, and any telephone calls to the employer. Claimant also testified that he did not have any regular working hours, that he did not have an office at the employer, that he was not supervised when he was transporting the vehicles, that the employer did not withhold taxes or social security from his check and that he was not eligible for employee benefits from the employer. However, claimant did not regard himself as free to set his own hours and stated that he responded when contacted by the employer.

Claimant testified that he gave priority to making runs for the employer, although he provided similar services for other dealerships and car rental companies during the period of time that he provided the services to the employer. Finally, claimant said that Mr. O had suggested the route he should use in going from (City 2) to (City 3) and that he had followed that route rather than following the route he would have preferred and that there were other times when Mr. O suggested routes to him but he could not remember any specifics. However, on the date of the injury, claimant stated that he was going from (City 2) to (City 1) and was not directed to take a specific route on that day.

Two persons employed by the employer testified. (Ms. L), who did not state what her job was, testified that the employer had a "contractual relationship" with claimant and that he was not classified as an employee. She denied that the employer ever controlled the route taken by claimant. Mr. O's testimony was to similar effect.

For purposes of determining entitlement to workers' compensation benefits, the term "employee" means "each person in the service of another under a contract of hire, whether expressed or implied, or oral or written." Section 401.012(a).

In Texas Workers' Compensation Commission Appeal No. 93110, decided March 25, 1993, we noted that "the issue of 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." (*Citing* Texas Employers Ins. Ass'n v. Bewley, 560 S.W.2d 147 (Tex. Civ. App.-Houston [1st Dist.] 1977, no writ.)) In addition we noted in Appeal No. 93110 that the definition of independent contractor in the 1989 Act incorporates common law factors courts have looked to in analyzing issues of whether a person is an employee or an independent contractor. Those factors include the independent nature of the worker's business; the worker's obligation to furnish necessary tools, supplies and materials to perform the job; the workers's right to control the progress of the work except as to final results; the time for which the worker is employed; and the method of payment, whether by the unit of time or by the job. *See* INA of Texas v. Torres, 808 S.W.2d 291, 293 (Tex. App.-Houston [1st Dist.] 1991, no writ) and the cases cited therein. Whether or not an injured worker was an "employee"or an independent contractor is a question of fact, determined in part by who had the right to control the activities of the servant. Goodnight v. Zurich Insurance Co., 416 S.W.2d 626 (Tex. Civ. App.- Dallas 1967, writ ref'd n.r.e.). In determining this fact, it is necessary to examine evidence not

only as to the terms of the contract, but also evidence with respect to who exercised control, or such evidence that is relevant as tending to prove what the contract really contemplated. Halliburton v. Texas Indemnity Insurance Company, 147 Tex. 133, 213 S.W.2d 677, 680 (1948). Issuance of paychecks and withholding of taxes is not conclusive of employee status. Mayo v. Southern Farm Bureau Casualty Insurance Co., 688 S.W.2d 241 (Tex. Civ. App.-Amarillo 1985, writ ref'd n.r.e.). We disagree with the carrier's contention on appeal that an actual exercise of control at the time an injury occurred must be proven before a retained right to control can be found.

We note that the case relied on by the hearing officer, Keith v. Blanscett, 450 S.W.2d 124 (Tex. Civ. App.- El Paso 1969, no writ), involves a similar situation to that here, and is not inapplicable as the carrier asserts. We note that this case (at page 128) and others cited therein set out some basic principals of analysis for situations such as this one:

> It is well established, however, that the right of control, and not necessarily the exercise of that right, is the test of the relationship of master and servant. The degree of control exercised varies according to the nature of the work. Although the right of control exists, the work in a particular case may be of a character which neither requires nor justifies its exercise.

. . . but it is not to be presumed that such control is surrendered by one who delivers an automobile which he owns . . . to one who is to drive it to a distant point and there deliver it to some designated person. It is not a natural inference to assume that the one who is to drive it is at liberty to run at a rate of speed that would injure the car . . . or otherwise operate the car in such a manner as to injure it. These are details of the work to be done, and the evidence fails to show such surrender of control as would necessarily render [the worker] an independent contractor . . . .

In this case, there was an undisputed and standing verbal contract of hire between the parties, and the services rendered by claimant were conducted in accordance with this understanding, whether or not he worked regular hours, had an office at the employer's location, or was classified by the employer as an employee. Claimant was clearly injured in furtherance of the business of the employer. Accomplishment of the task for which claimant was hired, driving a car between two cities, did not involve a special skill or expertise above that held by any driver's license holder (a fact considered by the court in the Keith case cited above). Whether or not the claimant replenished gasoline if it was needed does not, in our opinion, constitute the furnishing of "tools" as carrier argues, especially as claimant was fully reimbursed for this expense. There was no written agreement qualifying claimant as an independent contractor, so the hearing officer had to analyze the facts presented to him to analyze whether claimant acted as an employee or independent contractor. He could have chosen to believe that the employer, who

compensated claimant by the mile and paid for gasoline, maintained the right to control the route taken by claimant (and thereby the costs attendant to his services), whether or not that right was exercised on each and every occasion. We believe that this was a question of fact to be determined by the hearing officer, and there is sufficient evidence to support his conclusion that claimant was injured in his capacity as an employee of the employer.

Carrier also asserts that the hearing officer erred in admitting Claimant's Exhibit No. 5 in evidence. Our review of the tape recording of the hearing clearly indicates that the exhibit at issue was not admitted in evidence and the indication to the contrary in the hearing officer's decision was undoubtedly the result of inadvertence. For purposes of clarifying the record, however, we note that Claimant's Exhibit No. 5 was not admitted in evidence, and reform that part of his decision to reflect that it was not admitted.

We affirm the decision and order of the hearing officer, subject only to the reformation of the list of exhibits described above.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge