APPEAL NO. 980209
FILED MARCH 19, 1998

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 31, 1997, with hearing officer. With regard to the issues at the CCH, she (hearing officer) determined that the appellant (claimant) is not an employee of (employer) and that the respondent (carrier) is not liable for the claimant's _____, on-the-job injury under Section 406.144 for allegedly deducting the cost of workers' compensation insurance coverage from claimant's contract price. The claimant appeals the employee status determination, seeks a reversal of the decision and argues that he is the employee of the employer, either by way of its control over him or its deduction of the cost of workers' compensation insurance coverage from his contract price. The carrier responds and seeks an affirmance of the decision. Neither party appeals the Section 406.144 determination and, therefore, it became final by operation of law. Section 410.169.

DECISION

We affirm.

The hearing officer fairly summarizes the facts in the decision and we adopt her rendition of the facts. We discuss only those facts necessary to our decision. The parties stipulated that on _____, the claimant sustained an injury in the course and scope of installing cabinets at apartment buildings and that the carrier provided workers' compensation insurance for the employer. The claimant testified at the CCH that the employer's supervisor, (Mr. W), directed him which apartment units to install cabinets in and inspected his work after he completed the installation in each unit.

The claimant argued at the CCH and argues on appeal that the employer exercised the right to control his work progress, the details of his work and the methods of his operation while working. The carrier argued, and the hearing officer found, that the employer did not exercise such right of control. The hearing officer's decision focused on several important pieces of evidence. First, the claimant was free to complete his work at any time from 7:00 a.m to 8:00 p.m. Second, he was paid based on the work completed, rather then by the hour. Third, he was free to work for other contractors besides the employer. Fourth, the employer only supervised him to the extent that it directed where to work and inspected his work upon completion. And fifth, the claimant represented himself as an "Individual/Sole Proprietor" on a February 14, 1997, Internal Revenue Service Request for Taxpayer Identification Number and Certification form (Form W-9), and as a "subcontractor" on a disability insurance application form and on a March 14, 1997, Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41). Other facts in the record pointing to the claimant's independent contractor status included his testimony that he provided his own tools and hired an employee to assist him.

An employee is "each person in the service of another under a contract of hire, whether express or implied, or oral or written," Section 401.012(a). The claimant argues that he was employed by the employer under an express, oral contract. The claimant may be considered an "employee" under that general definition, but he is not the employer's employee if he was an independent contractor. Section 406.122(a)(1). The claimant also argues that he should be considered the employer's employee because the employer itself desired him to be its employee. The carrier's underwriter, (Mr. B) and its adjuster, (Mr. S), both testified at the CCH that the employer had taken the position that the claimant was its employee. There was no testimony from any representatives of the employer. An employer's position regarding whether a person is its employee is not determinative. We reject the notion that an employee who, based on the facts of the case, is an independent contractor is an employer's employee based on his oral agreement with the employer. If such an agreement is in writing and properly filed with the carrier, it may affect the person's employee status. Sections 406.123(e) and (f).

Under the 1989 Act, an independent contractor is defined as a "person who contracts to perform work or provide service for the benefit of another who ordinarily: (A) acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employee-employer relationship; (B) is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employee; (C) is required to furnish or to have employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and (D) possesses the skills required for the specific work or service." Section 406.121(2).

Independent contractors were also excluded from the "employee" definition under the predecessor statute. TEX. REV. CIV. STAT. ANN. Art. 8309 § 1 (Vernon Pamph 1992), now repealed (predecessor statute). However, the term "independent contractor" was not defined in the predecessor statute and the courts were often requested to offer their interpretation of the term.

We reject the claimant's reliance on the judicially-created definition of an "independent contractor" since the term is specifically defined in the 1989 Act. We do rely on the courts' interpretation, under the predecessor statute, of what level of control an employer may maintain over a person to avoid exercising a "right of control" and to avoid that person becoming its employee. In Texas Workers' Compensation Commission Appeal No. 92155, decided June 4, 1992, we stated:

> Where no contract between the parties establishes the status of the worker or the employer's right to control his work, an employee-employer relationship may be established circumstantially by evidence of actual exercise of control. Anchor Casualty Co. v. Hartsfield, 390 S.W.2d 469, 471 (Tex. 1965). If, after considering evidentiary factors bearing on one party's right to control the details of another's work, there is conflicting evidence as to the status of the worker, the issue is for the trier of fact. Eagle Trucking

> Co. v. Texas Bitulithic Co., 590 S.W.2d 200, 212 (Tex. Civ. App.-Tyler 1979), aff'd in part and rev'd in part on other grounds, 612 S.W.2d 503 (Tex. 1981). The general type of supervision which any general contractor must have over his subcontractor in order to see that the work is done in accordance with the plans and in a good and workmanlike manner does not constitute evidence of an employer-employee relationship. United States Fidelity & Guaranty Company v. Goodson, 568 S.W.2d 433 (Tex. Civ. App.-Texarkana 1978, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91078, supra.

The hearing officer in the case under review alludes to Goodson and stresses that the employer's inspection of the claimant's work was only a general type of supervision and did not display a right of control.

The determination of whether a person is an employee of the employer is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 950075, decided February 28, 1995. 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. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

We will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Although the claimant stated that Mr. W and the employer exercised a right of control over him, we conclude that the determination regarding his employee status is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. The determination is supported by the claimant's acknowledgment that Mr. W only had limited control over his work. Therefore, we affirm.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge