APPEAL NO. 990428

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.001 *et seq.* (1989 Act). On January 26, 1999, a contested case hearing (CCH) was held. The (hearing officer) determined that the respondent (claimant) sustained a compensable injury and that he had disability from September 4, 1998, to the date of the CCH. The hearing officer also determined that, for purposes of workers' compensation, claimant was an employee of (herein referred to as "employer"), at the time of the injury. Appellant (carrier) appeals these determinations on sufficiency grounds. Claimant responds that sufficient evidence supports the hearing officer's decision and order.

DECISION

We affirm.

Carrier generally challenged the injury and disability determinations and we will construe this as a challenge to the sufficiency of the evidence to support the hearing officer's determinations. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as damage or harm to the physical structure of the body and as disease or infection naturally resulting from the damage or harm. Section 401.011(26). A claimant may meet his burden to establish an injury through his own testimony, if the hearing officer finds the testimony credible. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, 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 or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that he felt a pop in his back while moving some racks. Claimant testified that after his _____, injury, he came in the next day limping, worked part of the day, and told his supervisor that he had injured his back. He said he came in to work on the 7th or 8th of September and talked with his supervisor about seeing a doctor. Claimant said he thought the first day he missed work was on September 6th or 7th and said he is still off work. Claimant said he has not been able to work and earn money since his injury. An Initial Medical Report (TWCC-61) signed by Dr. H states that claimant injured his back lifting racks and he sustained a back strain. A September 21, 1998, work status report states that claimant had a back strain and that he is off work.

In this case, the evidence conflicted regarding whether claimant sustained a compensable injury at work and whether he had disability. The hearing officer resolved the conflicts in the evidence and determined that claimant sustained a compensable injury. We will not substitute our judgment for the hearing officer's because her injury and disability determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Carrier next contends that the hearing officer erred in determining that claimant was an employee of employer and not an independent contractor. Carrier asserts that employer did not have the right to control claimant's work activities. Carrier contends that claimant was hired to work as an independent contractor for one job: to fix the Harris press.

There is no written contract showing the employment relationship between claimant and employer. Claimant testified that he was hired as an independent contractor to get the Harris press "up and running." Carrier's attorney asked claimant whether it was true that he was told that "once they got more hours [then he'd] be considered a more full time employee?" Claimant said he was told that, once the machine was running and another larger press machine was obtained, he would be working for employer and have his own "department." Claimant said that initially he was hired to be an independent contractor for just a few hours per week, but that the job ended up being 30 to 40 hours work per week. Claimant's wage statement indicated that he worked between 31 and 66 hours per week for 11 of the 13 weeks. The first week he started, claimant worked three hours and the 11th week he worked 15.11 hours. Claimant said all of the work he performed was for $12 per hour and that he was not paid for holidays. Claimant said he was hired by Mr. H to get the Harris press operational, but that Mr. B, another employee, gave him additional duties, including cutting and stacking paper, taking inventory, running small machines, and getting a camera and a processor to be operational. Claimant said Mr. H and Mr. B gave him his job duties on a daily basis. Claimant testified that he volunteered to do and did some plumbing and yard work for employer and that he painted some racks. Claimant said he would contact repair persons to come and service the Harris press, and that he would work with them to repair it.

Mr. H testified that he is the operations manager and that he told claimant when he hired him that he was not a regular employee and that employer would not have sufficient work for the Harris press for some time. He said he told claimant that he did not have any long term work and that claimant was hired for the purpose of getting the Harris press to operate. He said when he hired claimant, it was supposed to be short term, but that it "turned into long term." He said that claimant was not a regular employee and that when he hired a regular employee, all of the payroll, social security and other paperwork is filled out. Mr. H said claimant was not paid by payroll check like other employees, and that he was paid by "check request" after reviewing his time card. He said claimant was not paid "by the job" because it was not clear how long it would take to get the press to work. Mr. H testified that if the press had been operational, claimant would not have been working there any more.

Mr. B testified that claimant was hired to work with the Harris press because no one else knew anything about it. Mr. B said claimant volunteered for other jobs, such as yard work, and that he used his own chainsaw. He said claimant recognized that he would not get paid for holidays, that claimant did not have any set hours, and that claimant told him that he did other jobs for other businesses, including hauling work. Mr. B testified that the only reason that claimant had business cards for employer with claimant's name on them was because the press made them for four different people at a time, and claimant happened to be standing there, so his name was added. In affidavits, several employee stated that claimant told them he was engaged in outside money-making activities and other employees stated that claimant said he was a contract labor employee.

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." Texas Workers' Compensation Commission Appeal No. 950075, decided February 28, 1995. To analyze whether a person is an employee or an independent contractor, courts consider the independent nature of the worker's business; the worker's obligation to furnish necessary tools, supplies and materials to perform the job; the worker'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). Whether an injured worked was an "employee" or an independent contractor is a question of fact, determined in part by considering right to control. 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).

> The test to determine whether a worker is an employee or an independent contractor is whether the employer has the right to control the progress, details and methods of operations of the employee's work. [Citation omitted.] . . . The employer must control not merely the end sought to be accomplished, but also the means and details of its accomplishment as well. [Citation omitted.] Examples of the type of control normally exercised by an employer include when and where to begin and stop work, the regularity of hours, the amount of time spent on particular aspects of the work, the tools and appliances used to perform the work and the physical method or manner of accomplishing the end result.

Texas Workers' Compensation Commission Appeal No. 960147, decided March 5, 1996 (quoting Thompson v. Travelers Indemnity Co. of Rhode Island, 789 S.W.2d 277, 278-279 (Tex. 1990)).

Carrier's argument was that claimant was hired to render the Harris press operational, and that employer did not exercise control over claimant in the details of that

work. However, there was evidence that, although claimant was hired for that job, claimant did other work for employer. The hearing officer could find that claimant took direction from employer in additional duties, such as cutting and stacking paper and taking inventory. There was evidence that claimant furnished some tools used in some of the work, and that other tools were available at employer's office. There was evidence that employer would be in contact with outside repair persons, and that employer would notify claimant when he needed to come in and be there to work with the repair persons. There was conflicting evidence regarding whether employer controlled the details of claimant's work and whether claimant was an employee or an independent contractor. The hearing officer determined that claimant was an employee of employer rather than an independent contractor. We have reviewed the evidence and the hearing officer's determinations, and we conclude that her determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Carrier contends that hearing officer acted as an advocate and sought to "prove her version of the facts." The hearing officer did ask claimant questions, however, the hearing officer does have a duty to develop the record. Section 410.163. After reviewing carrier's assertions and the record, we perceive no reversible error.

We affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge