

APPEAL NO. 990748

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 March 2, 1999. The issues at the CCH were injury, the identity of the employer, timely notice of injury, and disability. The hearing officer found that Respondent (claimant herein) sustained an injury in the course and scope of her employment on _____, that (employer 1) was the claimant's employer at the time, that the claimant timely notified the employer of her injury and that the claimant had disability from November 12, 1997, through November 22, 1997. The appellant (carrier 1 herein) files a request for review arguing that the hearing officer erred in finding that the claimant was an employee of employer 1. Carrier 1 argues that the evidence established that the claimant was an independent contractor. The claimant responds that she was employed by employer 1 at the time of her injury and points to the fact that employer 1 withheld premiums for her workers' compensation coverage under a written agreement as a basis for carrier 1's liability. There is no response from Respondent in the appeal file.

DECISION

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

The hearing officer's factual findings in regard to injury, timely report of injury and disability have not been appealed and have become final pursuant to Section 410.169. The sole issue before us on appeal is whether or not the hearing officer erred in finding that at the time of the injury the claimant was employed by employer 1. We, therefore, will only discuss the evidence in the record that bears on that issue.

This includes testimony by the claimant that she worked as an independent contractor for nursing agencies, including employer 1. The claimant testified, and the written agreement in evidence between the claimant and employer 1 showed, that the claimant and employer 1 agreed to have employer 1 withhold workers' compensation premiums from her wages and to pay such amount to the proper agency. In the agreement the parties also agreed that employer 1 would withhold taxes from the claimant's earnings. The claimant testified that at the time of injury on _____, she was working as a registered nurse at a hospital where she had been placed by employer 1. The claimant testified that the injury took place while she was lifting a patient.

The hearing officer's finding of facts and conclusions of law included the following:

FINDINGS OF FACT

5. The Claimant signed "an independent contractor" agreement with [employer 1], to provide services as a licensed vocational nurse.

6. Under the terms of the "independent contractor agreement", [employer 1] withheld 20% of the Claimant's earnings for taxes, and withheld money's [sic] from Claimant's earnings for workers' compensation insurance premiums.
7. On _____, Claimant was assigned (by [employer 1]) to work at (Company), in (City), Texas. On this day, Claimant contacted the agency [employer 1] and was assigned to work at that particular location.
8. On _____, Claimant attempted to lift a female patient (weighing approximately 400 pounds) from the floor to the hospital bed along with two other co-workers. The Claimant sustained an injury to her low back in the process of lifting the heavy patient.

* * * *

16. [Employer 1] controlled Claimant's schedule and dictated her assignments when she was "working for them."
17. The Claimant was a very credible witness. Claimant denied the occurrence of any other incidents which could have caused her back problems, and traced it to the lifting of the heavy patient on _____.
18. On _____, Claimant sustained an injury in course and scope of her employment with [employer 1] and while assigned to work at (Company) in (City).
19. [Employer 1] withheld money's [sic] from Claimant's earnings for workers' compensation coverage and assumed the "employer's duties" for workers' compensation purposes.

CONCLUSION OF LAW

4. [Employer 1] was the Claimant's employer at the time of the claimed injury.

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 overwhelming 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). Applying this standard we find sufficient evidence in the record to support the hearing officer's factual findings.

Carrier 1 argues that the question of whether or not the claimant was an independent contractor or an employee turns on the issue of right of control. We do not disagree. However, the hearing officer points to indicia of right of control in his findings of fact and we do not think he erred as a matter of law in finding that the claimant was an employee of employer 1 on the date of injury.

We note that Section 406.123 provides as follows in relevant parts:

- (a) A general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor.
- (b) If a general contractor has workers' compensation insurance to protect the general contractor's employees and if, in the course and scope of the general contractor's business, the general contractor enters into a contract with a subcontractor who does not have employees, the general contractor shall be treated as the employer of the subcontractor for the purposes of this subtitle and may enter into an agreement for the deduction of premiums paid in accordance with Subsection (d).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge