APPEAL NO. 990941

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 30, 1999. The issues at the CCH were whether the respondent/cross-appellant (claimant) sustained a compensable injury on _____, whether the claimant was an employee of (employer) or an independent contractor at the time of the claimed injury, and whether the claimant had disability resulting from a compensable injury. The hearing officer concluded that the claimant did not sustain a compensable injury on _____, because the claimant was not an employee of (employer) at the time of the injury, that the claimant was an independent contractor at the time of the claimed injury, and that he did not have disability because he did not have a compensable injury. The appellant/cross-respondent (carrier) appeals the hearing officer's listing of a stipulation of fact not supported by the record, argues that there is insufficient evidence to support a finding of fact which is also in direct conflict with a conclusion of law, and urges that there is legally insufficient evidence to support the order to pay medical and income benefits. The claimant appeals the hearing officer's findings of fact and the corresponding conclusions of law that he worked as an employee of (employer) on weekdays and as an independent contractor on weekends and that the injury occurred while the claimant was working as an independent contractor, citing evidence at the CCH which he urges shows that he was an employee of (employer) at all times and at the time of the vehicle accident injury. In response to the carrier's appeal, the claimant agrees with the hearing officer's stipulation and finding of fact that he was in the course and scope of employment at the time of the injury and with the order of the hearing officer to pay benefits. Carrier's response to the claimant's appeal urges that the hearing officer correctly found that the claimant was an independent contractor on weekends and at the time of the injury and that the conclusions of law claimant appeals are correct as a matter of law.

DECISION

With necessary modifications, the decision is affirmed.

Initially, we note there is no basis in the record for the hearing officer's finding of fact that the parties stipulated that "[o]n _____, the Claimant was the employee of [employer], the employer." The record clearly shows that the parties only stipulated to two matters, neither of which included the above. Also, the above stipulation is in conflict with the carrier's position throughout the hearing and with other findings and conclusions of the hearing officer. We therefore set aside this purported stipulation shown as Finding of Fact 1A in the Decision and Order.

The evidence in this case is set forth in the Decision and Order of the hearing officer and will only be summarized briefly here. The claimant started performing driving/delivery duties for (employer) as an independent contractor in 1996 and entered into an independent contractor agreement with (employer) in August 1996. Also in evidence is an Agreement Between Motor Carrier and Owner Operator (TWCC-82), to require the owner operator to act as employer, with the terms of the agreement running from August 13,

1996, to August 13, 1998, and signed by both parties. (Employer) is a trucking and delivery service and, according to the testimony of the president, DC and a dispatcher, JS, has employees, independent contractors and several who do both. Subsequently, the claimant wanted to make more money and requested to be brought on as an employee and a position was found in May 1997. According to the evidence, the claimant was required to clock in and was paid an hourly wage Monday through Friday as an employee. To earn additional money, the claimant desired to work on weekends and would be paid a higher commission rate for any deliveries made. According to DC, the claimant and others performed, on a voluntary basis, on weekends as independent contractors. They were paid higher commissions, do not clock in or out, generally use their own vehicle (could use a bigger van from the company if necessary and at reduced commission), could be at home or elsewhere, and were basically under the delivery constraints set by the client/customer wanting a delivery. Although DC testified that the independent contractor relationship on weekends was well understood by all the parties, the claimant stated he believed he was an employee at all times and when on call after May 1997.

On _____, a Saturday, the claimant received a couple of pager calls and made a couple of deliveries. He testified that later in the afternoon he had made a delivery but had not called in the completion of delivery from the customer's place of business as is usual because the customer was very busy. While on his way home he states that his pager went off and he also states he decided he needed to call in the completion of delivery so he exited the interstate with the intent to call in from a convenience store although he was close to his home. A pager call from the (employer) dispatcher during the time frame was not shown in the pager records. In any event, as he exited to call in from a convenience store, he was involved in a motor vehicle accident at 6:33 p.m. He was taken to the hospital and was released the same evening. He states that he was called to come back the next day, that he had pain over much of his body and particularly in the cervical and lumbar spine and in his right arm and leg. A subsequent MRI revealed mild bulging of the annulus fibrosis at C4 through C7 and L4-5. The claimant testified he has not been released to work by his doctor and that he has not worked since the accident.

The carrier urges error in the hearing officer's finding of fact that at the time of the injury the claimant was in the course and scope of employment. It is clear to us from the Decision and Order of the hearing officer that she determined the claimant was an independent contractor at the time of the injury and hence could not be in the course and scope of employment with (employer) at the time of the injury. Thus, this finding of fact is inaccurate as stated and does not result in the claimant being determined to be an employee of (employer) at the time of the injury. We set aside this finding of fact insofar as it implies in any way that the claimant was an employee of (employer) at the time of the injury. It is apparent from the hearing officer's discussion that she concluded that the claimant would have been in the course and scope of employment if he were an employee at the time of the accident. She apparently reasoned that the injury would not be barred from compensation under the "going from and to" provisions of Section 401.011(12), if the claimant had been an employee, since the assumed employer paid (apparently through the commissions paid), for his round trip mileage and his weekend delivery activity would start

from and extend to his home. There is some evidence from which this inference and conclusion could be made. Texas Workers' Compensation Commission Appeal No. 980133, decided March 6, 1998. We do not conclude that the hearing officer's determination, as clarified and modified above, is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The hearing officer also found that at the time of the injury, the claimant was working as an independent contractor. This presented a factual question for the hearing officer to resolve from the evidence before her. Claimant urges that he was an employee at the time of the injury and point to factors he believes dispel an independent contractor relationship with (employer), such as that he made deliveries in a (employer) uniform when making weekend deliveries, that his pay stubs did not breakout commissions vs. wages (DC testified to the contrary and pointed to taxable amounts and mileage or commission amounts), that he could use a company vehicle if necessary and that he was not able to exercise the freedoms of control of an independent contractor. There was opposing testimony that the claimant could accept or reject work, that the conditions of the deliveries were governed and controlled by the particular client being serviced by the claimant, that the claimant used his own vehicle as a norm and did not clock in or out for weekend service, that the same relationship existed and was known between (employer) and other drivers, and that there were signed agreements that the claimant had an independent contractor relationship with (employer) which would apply on weekends and outside the regular work week. Whether the claimant was an employee or an independent contractor at the time of the injury was a factual question for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 950976, decided July 19, 1995; Texas Workers' Compensation Commission Appeal No. 981453, decided August 12, 1998 (Unpublished). From our review of all the evidence, we cannot conclude that the hearing officer's determination on this issue was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). Accordingly, we affirm the hearing officer's finding and conclusion that at the time of the injury on _____, the claimant was working as an independent contractor. Inasmuch as the claimant was not an employee, he did not sustain disability as that term is defined in the 1989 Act. Section 401.011(16). Thus, we also affirm the determination that the claimant did not have disability.

Regarding the carrier's appeal of the order which provides that the carrier is ordered to pay medical and income benefits in accordance with this decision, we agree that it tends to confuse the resolution of the case given the other corrective actions we have found necessary. It would have been clearer if the order had just stated that the carrier was not liable for medical or income benefits under the decision of the case; however, the language used does not establish liability since it states "in accordance with this decision" and the decision clearly absolved the carrier of liability for the injury of _____.

With the modifications set forth above, the decision and order are affirmed. The carrier is not liable for medical or income benefits for the claimant's injury of _____.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Alan C. Ernst
Appeals Judge