APPEAL NO. 991019

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 9, 1999, a contested case hearing was held. With regard to the issues before her, the hearing officer determined that appellant (claimant) was not an employee of the (referred to as the newspaper), but was an independent contractor and that had claimant been an employee of the newspaper, she failed to timely file her claim for compensation and did not have good cause for failing to do so.

Claimant appeals on both issues, contending: (1) that the newspaper had controlled the details of claimant's work, giving her specific direction on how and when she was to deliver papers and the specific route she was to follow; and (2) that claimant's duty to file her claim had been tolled by the employer's (the newspaper) failure to file an Employer's First Report of Injury or Illness (TWCC-1) pursuant to Section 409.008 and Section 409.005. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed as reformed.

Claimant testified how she applied for and obtained a position delivering papers for the newspaper. In evidence is an unsigned, undated document entitled (referred to as the independent contractor agreement). Claimant testified that she signed some kind of document but that her copy was lost in a motor vehicle accident. The newspaper's copy of the signed agreement was apparently lost in a move. The independent contractor agreement is a two-page document setting out the purchase and payment of newspapers scheme, the receipt, delivery frequency and payment status of subscribers, the delivery person's minimum standards and that the delivery person (referred to as a carrier in the independent contractor agreement) may engage in other businesses and employment. After claimant was hired, claimant received training by accompanying the outgoing delivery person for two days, was given a list of places where claimant was to deliver newspapers and a "demo tape," which had apparently been made by the outgoing delivery person telling which roads to take, etc. After taking over the route for a few weeks, claimant testified that she met with her supervisor, Ms. G, and Ms. G's supervisor, Mr. T, and asked to reverse the route because of traffic considerations and ease in throwing papers. According to claimant, Mr. T instructed her "not to do it" and to continue using the route that was listed on the tape and written directions. (Whether that meeting occurred and/or what was said is disputed by carrier through the testimony of Mr. J, the newspaper's circulation manager.) On (MVA date of injury), claimant was injured in a head-on collision with another vehicle as she was delivering papers. At that point, claimant considered herself an independent contractor and eventually filed a tort suit against the other driver and the newspaper.

The newspaper filed a motion for summary judgment, arguing that (1) if claimant was an independent contractor, then the newspaper is not liable as a matter of law and (2) if, in the alternative, claimant was an employee (employer had the right to control details of claimant's work), the "Texas Workers' Compensation precludes [claimant's] lawsuit against [the newspaper]." The judge, in an order signed March 18, 1998, accepted the newspaper's argument dismissing the suit against the newspaper. Claimant subsequently filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated March 18, 1998, for workers' compensation benefits as an employee. Carrier defends this action by alleging claimant is an independent contractor and that the court pleadings and the judge's order was phrased in terms of "if" the claimant is an independent contractor or an employee without finding one or the other and that carrier is relieved of liability under Section 409.003 and Section 409.004 for failure to timely file a claim. Claimant responds that it was the newspaper that advanced the proposition that claimant might be an employee by virtue of controlling the details of claimant's work and that the time for filing a claim had been tolled by virtue of the employer/newspaper's failure to file a TWCC-1 pursuant to Section 409.008.

The hearing officer determined that "[b]ased on the evidence as a whole it is [her] finding the Claimant was in independent contractor at the time of the injury." Claimant appeals that finding, contending that the newspaper "did control the details of the work which Claimant was required to do," pointing to the specific directions as to how and when claimant was to deliver newspapers, the routing instructions she was given and that claimant's request "to change such routing . . . was denied." Interestingly enough, our leading case, Texas Workers' Compensation Commission Appeal No. 941046, decided September 16, 1994, involves a "substitute carrier" for this same newspaper. In Appeal No. 941046, the Appeals Panel specifically stated,"[w]e are not here called up to decide whether the independent carriers [which would include claimant in the instant case] were independent contractors." Section 406.121(2) defines "independent contractor" as follows:

> "Independent contractor" means a person who contracts to perform work or provide a service for the benefit of another and who ordinarily:
>
> (1) acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;
>
> (2) 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;
>
> (3) is required to furnish or to have employees, if any, furnish necessary tools, supplies or materials to perform the work or service; and
>
> (4) possesses the skills required for the specific work or service.

The employee in Appeal No. 941046 was a "substitute carrier" who did not have a written agreement (the independent contractor agreement) with the newspaper. Appeal No. 941046 provides a detailed analysis of the distinction between an independent contractor and an employee, particularly as it relates to newspaper delivery people and cites and analyzes several appellate court decisions. The cases discussed in Appeal No. 941046 include Carter Publications, Inc. v. Davis, 68 S.W.2d 640 (Tex. Civ. App.-Waco 1934, no writ), and Mid-Continent Freight Lines v. Carter Publications, Inc., 336 S.W.2d 885 (Tex. Civ. App.-Fort Worth 1960, writ ref'd), where newspaper carriers were determined to be the employees of the independent contractors who hired them and not the employees of the newspapers. The Texas Supreme Court, in Newspapers, Inc. v. Love, 380 S.W.2d 582, 590 (Tex. 1964), commented on these cases as follows:

> We think that the effect of the Carter-Davis decision was to establish a rule in Texas that the distribution of newspapers to individual purchasers thereof may be accomplished through a medium of independent contractors, provided, of course, that such distribution is effected under a contract similar in terms to the one considered by the court in Carter-Davis.

In the instant case, and unlike Appeal No. 941046, the evidence is relatively undisputed that claimant was not a "substitute," that she purchased the newspapers that she delivered and that the distribution of the newspapers was pursuant to a contract (the independent contractor agreement). Although Appeal No. 941046 held the claimant in that case to be an employee, for the reasons stated, we believe that Appeal No. 941046, although providing important guidance and analysis, is clearly distinguishable from the instant case where there was evidence from which the hearing officer could find that claimant was in the category of an "independent contractor" and had signed an independent contractor agreement. The hearing officer, as the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)), could disbelieve claimant about her meeting with Ms. G and Mr. T (neither of whom testified or gave statements) or what was said at that meeting and rely on the testimony of Mr. J that the only limitation on claimant was that as stated in the independent contractor agreement that claimant complete delivery of the papers by a certain time and not have more than a certain amount of complaints. We affirm the hearing officer's decision that claimant was an independent contractor, noting that even claimant considered herself an independent contractor until the order on the motion for summary judgment.

The second issue was:

> 2. Is the Carrier relieved from liability under [Section 409.004] because of Claimant's failure to timely file a claim for compensation with the Commission [Texas Workers' Compensation Commission] within one year of the injury as required by [Section 409.003]?

The hearing officer answered that issue by finding that claimant "has failed to establish good cause for her failure to file her claim with the Commission within one year of the date of the injury" and concluded:

CONCLUSION OF LAW

> 4. Had the Claimant been found to be an employee of [the newspaper], the Carrier would be relieved of liability under [Section 409.004] because of Claimant's failure to timely file a claim for compensation with the Commission within on [sic] year of the injury as required by [Section 409.003].

Although claimant clearly argued that the one-year filing requirement had been tolled pursuant to Section 409.008, the hearing officer, in Conclusion of Law No. 4, failed to properly consider Section 409.008, which provides:

> If an employer or the employer's insurance carrier has been given notice or has knowledge of an injury to . . . employee and the employer or insurance carrier fails, neglects, or refuses to file the report under Section 409.005, the period for filing a claim for compensation under Sections 409.003 and 409.007 does not begin to run against the claim of an injured employee . . . until the day on which the report required under Section 409.005 has been furnished.

As carrier points out, this issue is largely mooted by our affirmance of the hearing officer's determination that claimant is an independent contractor; we nonetheless feel constrained to point out that the hearing officer's Conclusion of Law No. 4, quoted above, is technically incorrect. Had the claimant been found to be an employee of the newspaper, then the employer or the carrier, having knowledge of claimant's injury, would have been obligated to file a TWCC-1 under Section 409.005, and the failure to do so would have tolled the requirement of filing a claim until the day that the TWCC-1 had been furnished pursuant to Section 409.008.

Although it does not change the ultimate outcome of the case, we reform the hearing officer's Conclusion of Law No. 4 and Decision to read:

> Had the Claimant been found to be an employee of [the newspaper], the Carrier would <u>not</u> be relieved of liability under Section 409.004 because the

Claimant's requirement to file her claim within one year of the injury as required by Section 409.003 has been tolled by the employer or Carrier's failure to file a TWCC-1 pursuant to Section 409.008.

Accordingly, the hearing officer's decision and order is affirmed as reformed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge