APPEAL NO. 991328

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On May 27, 1999, a contested case hearing (CCH) was held. The issues concerned whether the appellant, who is the claimant, sustained a compensable injury on _____; whether the respondent's (carrier) insured, (trucking company), was the claimant's employer for workers' compensation purposes; and whether the claimant had disability as the result of a compensable injury for any period of time.

The hearing officer held that when claimant was injured, he was not the employee of the trucking company nor under their control at the time of the injury. She held he had not sustained a compensable injury and therefore had no disability.

The claimant has appealed and argues that evidence that the hearing officer appeared to consider regarding whether claimant's father, Mr. M, was an owner/operator and independent contractor, was not legally or factually sufficient to establish this status. The claimant argues that the trucking company maintained the right of control over the claimant. The carrier responds that the evidence supports the hearing officer, and that it established that claimant was the employee of an independent contractor.

DECISION

Affirmed.

It was undisputed that the claimant drove a truck that was owned by his father, Mr. M, and leased to the trucking company, first in 1997, and then again in 1998, shortly before a motor vehicle accident on _____, when he was seriously injured. He said he had begun working for the trucking company shortly before the accident. The accident was not the fault of claimant. Mr. M was a nonsubscriber with respect to workers' compensation.

Mr. M testified and agreed that he owned two trucks, both under lease to the trucking company. Mr. M paid the maintenance and furnished the gasoline and tools used on the trucks, which were used to haul gravel and dirt for customers of the trucking company. The trucks had the trucking company insignia on them, and were under an exclusive lease. Although Mr. M argued that one customer, Mr. G, had been given permission by the trucking company to call Mr. M directly to arrange for hauling jobs, this was denied by the operations manager for the trucking company, Mr. B, and district manager, Ms. MC. Mr. M and the claimant testified that the trucking company kept an 18.5% commission on each haul and paid the rest to Mr. M for jobs. They said that the payment of drivers for Mr. M was up to Mr. M, who also took out taxes and social security for his drivers. Mr. M's agreement was to furnish trucks and suitable drivers, who had to have the required license and were required to pass a physical and a drug test. The accident in question happened after Mr. G called Mr. M directly and arranged for a job.

Mr. M agreed that he signed an Agreement to Require Owner Operator to Act as Employer (TWCC-82) form for each truck, but didn't really read or understand that it required him to furnish workers' compensation. He said he did understand that it said he was an independent contractor and assumed the responsibilities of an employer. Mr. M said that he was required to sign this paperwork in order to get paid. He said he considered himself to be the employee of the trucking company.

Mr. B stated that the trucking company's customers had to call it to arrange for hauls, so the company could centrally keep track of availability of its trucks under lease. He said that the requirements requested of drivers for its leased companies were legal requirements. He said that the TWCC-82 forms were filed with the Texas Workers' Compensation Commission (Commission), with a copy maintained at the trucking company headquarters. Mr. B agreed that its owner/operators signed statements acknowledging the procedure to follow to get "benefits," but that this referred to accidental death and dismemberment. Mr. B said that the benefits were never described to its owner/operators unless they asked. The other benefit included liability insurance for any property damage caused by trucks. Mr. B said that no taxes were withheld from the amounts paid to the drivers. Drivers had to turn in slips for each haul which were used to invoice, and their logs were turned in weekly. There were no slips for any authorized run on July 17th which had been submitted for invoicing.

Mr. B stated that the trucking company had no "employees," that the drivers were not employees, and that the company did not maintain workers' compensation insurance for them. He indicated that all of the trucking company's trucks were procured on owner/operator leases. Clarifying questions were never asked as to why the trucking company maintained workers' compensation insurance or for whom it was maintained, if there were no "employees." The agreement in question did not bear Mr. M's signature nor that of Ms. MC, but of another person. Mr. B said that aside from dispatching trucks through Mr. M to the customer's location, there was no day-to-day oversight over the drivers and the details of the deliveries. Mr. M did not disagree with this.

Ms. MC stated that her records showed that the Ford truck owned by Mr. M was not operational the week of the accident. She said that Mr. M was "terminated" from the lease agreement when it was discovered he had been hauling "on the side" for Mr. G. Ms. MC said that drivers were required to complete driver information forms which were not applications for employment. According to Ms. MC, the claimant had not fully qualified in submitting all paperwork for driving trucks until the date of the accident. One form that was part of the package, an "I-9," referred to the trucking company as the "employer" and claimant as the "employee." The general information form referred to the driver as a contractor.

A transcribed interview with Mr. G (but unsigned by him) was put into evidence; Mr. G stated that Ms. MC had told him, on several occasions, just to call truckers directly when he wanted a job performed.

The agreement signed on June 19, 1998, by the trucking company and Mr. M for the Ford truck, and in effect during the time of the accident, quite unambiguously is described as a "truck lease and owner/operator agreement." Under the agreement, Mr. M "covenants and warrants" that he enters into the agreement as an independent contractor; the agreement goes on to so describe Mr. M at various points, and expressly states that Mr. M maintains control over his drivers.

However, that agreement also states the following:

> Contractor hereby appoints [Trucking Company] as agent of Contractor for the procurement, if necessary, and payment of any and all liability insurance, workmen's compensation insurance, or accidental disability or death insurance. [Trucking Company] shall deduct any and all payments so made on Contractor's behalf together with an administrative fee for the procurement and processing of such payments from the revenue fee required to be paid by [Trucking Company] to Contractor. [Trucking Company] shall be beneficiary in any and all liability insurance as an additional insured on insurance obtained by Contractor independently or procured as provided pursuant to this lease agreement. Contractor shall notify [Trucking Company] on any accident according to the Safety Manual specifications.

On June 19, 1998, and June 27, 1998, the trucking company and Mr. M signed a TWCC-82 form in which Mr. M agreed to assume all responsibilities of an employer. The provision which was not signed or checked is that by which the parties agree that the trucking company would procure and furnish workers' compensation insurance, with the option to deduct or not deduct premiums for this from the amount paid to Mr. M. An attorney at the CCH, who separately represented the trucking company, objected to questions from claimant's attorney as to what expenses were paid from its 18.5% commission, citing that this was proprietary information. The hearing officer sustained the objection.

Generally, a contract setting forth the relationship of the parties will control. The trier of fact can consider other evidence to determine whether the contract is a sham or has been abandoned, *see* Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964), or where the contract does not clearly speak to the right of control. Archem Company v. Austin Industrial, Inc., 804 S.W.2d 268 (Tex. App.-Houston [1st Dist] 1991, no writ). Issuance of paychecks and withholding of taxes is not conclusive of employee status. Mayo v. Southern Farm Bureau Casualty Insurance Company, 688 S.W.2d 241 (Tex. App.-Amarillo 1985, writ ref'd n.r.e.). However, the general supervision a general contractor exercises over a subcontractor to see that work is done in accordance with a contract does not constitute evidence of an employer-employee relationship between the general and the "sub." U.S. Fidelity & Guaranty Company v. Goodson, 568 S.W.2d 443 (Tex. Civ. App.-Texarkana 1978, writ ref'd n.r.e.). We believe that the evidence sufficiently supports the hearing officer's determination on the matters of employment and control. Because we regard the agreement as unambiguous and express on matters concerning the right of

control over the drivers, the hearing officer did not need to consider arguments that the trucking company exercised any right of control over the claimant. *See* Texas Workers' Compensation Commission Appeal No. 92134, decided May 22, 1999. Nevertheless, her assessment that it did not is sufficiently supported by the record; we will observe that Section 406.125 makes clear that direction concerning safe work practices will not constitute the imposition of employer status on a general contractor.

However, as we see this, the issue as to whether the claimant was an employee of the trucking company (or the litigated sub-issue of whether Mr. M was an independent contractor) does not entirely resolve carrier liability in this case. The owner operator agreement plainly contemplates that the trucking company can purchase workers' compensation insurance as the "agent" for Mr. M, notwithstanding his independent contractor status. Thus, the hearing officer could still have found that carrier was liable notwithstanding the fact that the claimant was not the trucking company's employee or that Mr. M was an independent contractor. The operative words in the agreement concerning insurance, however, are that the trucking company will procure insurance "as necessary." Under the record here, we believe that the owner operator agreement coupled with the TWCC-82, signed essentially contemporaneously with that agreement, indicated that it would not be "necessary" for the trucking company to purchase workers' compensation insurance as an agent for Mr. M. The hearing officer could believe that this form was filed in the ordinary course of business with the Commission, and a date-stamped copy was not necessarily required.

For these reasons, we affirm the decision and order of the hearing officer.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge