

APPEAL NO. 991524

On July 1, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issue at the CCH was whether the deceased, sustained a compensable fatal injury on _____. Appellant, (claimant), who is the deceased's surviving spouse, requests that the hearing officer's decision that the deceased did not sustain a compensable fatal injury on _____, be reversed and that a decision be rendered in her favor or that the case be reversed and remanded to the hearing officer. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

The parties stipulated that on Saturday, _____, the deceased died of fatal injuries sustained in a motor vehicle accident (MVA) and that, if the deceased sustained a compensable fatal injury, the eligible beneficiaries of the deceased are claimant and the deceased's two children. Claimant contends that the deceased was acting in the course and scope of his employment as an employee of (Trucking Company) when he sustained a fatal injury in an MVA on _____. Carrier contends that at the time the deceased sustained his fatal injury, he was acting in his capacity as the owner/lessor of trucks he leased to Trucking Company and was fulfilling his contractual obligation under the lease agreements to maintain and repair the trucks he leased to Trucking Company and was not acting in the course and scope of his employment as an employee of Trucking Company.

In three lease agreements, deceased leased a total of five trucks to Trucking Company and contracted to provide drivers for the trucks. The lease agreements refer to the trucks as the leased equipment. The lease agreements provide that Trucking Company shall have continuous and exclusive possession, control, and use of the leased equipment for the duration of the leases. The lease agreements were in effect on _____. The lease agreements also provide that the deceased, as the owner of the leased equipment, shall be solely responsible for all maintenance and repairs of the leased equipment, including, among other things, parts and repairs, and that he would maintain the leased equipment in good working order and condition. In addition, the lease agreements provide that deceased, as the owner of the leased equipment, is prohibited from entering into any "trip-lease" or other agreement involving the leased equipment with any other entity or permit the unauthorized use of the leased equipment.

MB testified that he is a consultant for Trucking Company and that he is familiar with the business of Trucking Company, including the lease agreements. MB testified that deceased leased trucks he owned to Trucking Company and was also employed as a driver for Trucking Company to drive trucks he leased to Trucking Company. He referred to the deceased as an owner/operator. MB explained that the deceased had two roles, one as a driver for Trucking Company and the other as the owner of the trucks leased to

Trucking Company. MB said that when the deceased was dispatched by Trucking Company under a weigh bill he would get driver pay from Trucking Company that would be reflected on a W-2 tax form and that as the owner of the leased truck, he would also get a settlement for the use of the truck from Trucking Company, which he referred to as rents and royalties for the truck, which would be reflected on a 1099 tax form. The driver paycheck and the truck settlement check were two separate checks. The driver pay was a percentage of the net transportation charge and the truck settlement was a percentage of the net transportation charge. Deceased would also get a truck settlement check when another driver would be dispatched under a weigh bill to drive one of the trucks leased to Trucking Company by deceased. Deceased would not get driver pay unless he turned in a weigh bill for driving a dispatched load and the truck settlement was also dependent on a weigh bill because the weigh bill was used to bill the customer. Documents showed wages Trucking Company paid to deceased for driving during several weeks preceding _____. Other documents, for time periods after deceased's death, showed what a truck settlement consisted of.

MB agreed that Trucking Company had the exclusive use of the trucks deceased leased to Trucking Company, but said that under the lease agreements deceased had the sole responsibility for the repair of the trucks he leased to Trucking Company. MB also agreed that if claimant repaired a truck he leased to Trucking Company that that would be furthering the affairs of Trucking Company but that such repair would also benefit the deceased as the owner of the truck. There is no dispute that when the deceased or one of the other drivers deceased provided to Trucking Company to drive the trucks deceased leased to Trucking Company were dispatched by Trucking Company under a weigh bill to haul a load for Trucking Company that they were employees of Trucking Company and that Trucking Company provided workers' compensation insurance with carrier for its employees.

MB said that he investigated the circumstances of the _____, MVA in which deceased sustained his fatal injury. MB said that on _____, deceased was not working as a truck driver for Trucking Company, that deceased was not paid driver pay on that day, that deceased had not been dispatched by Trucking Company on that day under a weigh bill to make a haul for Trucking Company, that deceased was not under the control of Trucking Company on that day, and that the pickup truck claimant was driving when he sustained his fatal injuries on that day was one of the trucks claimant leased to Trucking Company for Trucking Company's exclusive use.

In a written statement, BM wrote that he is self-employed and was a contract employee for Trucking Company for two years; that on _____, he was in Trucking Company's garage helping deceased repair one of deceased's vehicles; that at about lunch time, they took a break and deceased said he would go to "International" (several of the trucks claimant leased to Trucking Company were International trucks) to pick up parts they needed, while BM and his helper, JC, went to lunch; that deceased did not mention going anywhere else because he was trying to get his truck running again; that deceased was going to get the parts BM needed for the truck and come straight back to Trucking

Company so that BM could get back to work on the truck as soon as he returned from lunch; that as he, BM, was leaving Trucking Company to go home for lunch he saw deceased go to a gas station and get gas and five gallons of diesel (fuel) to wash tools with; and that he, BM, lives about five miles from Trucking Company. BM further stated that, as he was sitting down to lunch, he heard the sirens going; that about 30 minutes later someone from Trucking Company called him and told him that deceased had been killed in an accident; that deceased was going to go straight to the parts store and straight back to Trucking Company so that "we" could get the truck operational again; and that Trucking Company was really pushing deceased to get the truck fixed.

RT stated in a written statement that he is self-employed and contracts with Trucking Company as an owner/operator; that on _____, he went to Trucking Company to work on the computer; that while he was there he saw deceased repairing the rear differential of an International tractor that deceased owned and leased to Trucking Company; and that BM was helping deceased. RT also stated that he left Trucking Company's terminal about 12:30 p.m. while deceased and BM were still working on the vehicle; that the vehicle was torn down; that he knows that deceased was looking for another rear-end to put on it; that when he, RT, left deceased told him that he was going to (City A) to look in junk yards for the parts he needed to repair the vehicle; and that he knew that deceased had to get the vehicle fixed as soon as possible to get it back into service. RT further stated that he learned later that deceased was involved in a fatal accident around 1:00 p.m.

It is not disputed that deceased suffered fatal injuries in an MVA on _____, while he was driving a pickup truck he had leased to Trucking Company for its exclusive use and that at the time of the MVA he was on his way to City A to obtain parts to repair another truck that he had leased to Trucking Company for its exclusive use and that the truck that was being repaired was on Trucking Company's premises.

Claimant appeals the following findings of fact, conclusion of law, and decision and order of the hearing officer:

FINDINGS OF FACT

4. By lease agreement in effect on _____, the Decedent leased five commercial trucks that he owned to [Trucking Company] for its exclusive and continuous use in its business, which included hauling freight.
5. By the same agreement, the Decedent leased his employees and himself to [Trucking Company] as drivers of trucks in its business, and to be under the right of control by [Trucking Company] when they were driving.
6. [Trucking Company] provided workers' compensation for the Decedent and his employees as leased drivers, but not to Decedent

as an independent contractor who leased trucks to the company. [Trucking Company] had workers' compensation insurance with [carrier].

7. On _____, the Decedent was not scheduled to drive, and did not drive, a truck for [Trucking Company]. On that day, the Decedent was in the process of repairing one of his leased trucks, as it was his responsibility under the leasing agreement.
8. On _____, the Decedent acted solely in his capacity as an independent contractor of [Trucking Company], and was not in the status of an employee of [Trucking Company].
9. On _____, the Decedent did not sustain a fatal injury that arose out of, or was in the course and scope of, any employment he had with [Trucking Company].

CONCLUSION OF LAW

2. The Deceased did not sustain a compensable fatal injury on _____.

DECISION

On _____, the Decedent was an independent contractor of, not an employee of, [Trucking Company] when he sustained his fatal injury. Thus, the Decedent did not sustain a compensable fatal injury on _____ for which the Carrier would be liable for benefits.

ORDER

The Carrier is not liable for benefits and it is so ordered.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). "Course and scope of employment" is defined in Section 401.011(12), as "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." "Employee" is defined in Section 401.012, and "Independent Contractor" is defined in Section 406.121(2). Under Texas case law, the test for determining whether one is an employee or an independent contractor is the existence of the right to control the details of that person's work. Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964).

Claimant contends that the evidence shows that the deceased was under the absolute control and direction of Trucking Company because the lease agreements

provided for the exclusive use of the leased trucks by Trucking Company and that on _____, the deceased had been ordered to make repairs to a truck he had leased to Trucking Company. While the lease agreements do provide for Trucking Company's exclusive use of the leased trucks, they also provide that the deceased is solely responsible for all maintenance and repairs of the leased trucks and it is clear from the hearing officer's Statement of the Evidence that he determined that there was no evidence presented that Trucking Company had any control over how the deceased was to accomplish the repair of the leased trucks. While the hearing officer states that Trucking Company "got on" the deceased to repair the truck, he did not find that deceased had been "ordered" to make those repairs, and, as noted, it was the deceased's responsibility under the lease agreements as the owner and lessor of the trucks to have the trucks repaired and to maintain them in good working order. The evidence presented a question of fact for the hearing officer to determine whether the deceased was acting in the status of an employee of Trucking Company at the time of his fatal injuries.

Texas Workers' Compensation Insurance Fund v. Rodriguez, 953 S.W.2d 765 (Tex. App.-Corpus Christi 1997, pet. denied), which is cited by claimant, involves the application of the personal comfort doctrine during a work break, which we do not find to be a factor in the instant case. Chevron, U.S.A., Inc. v. Lee, 847 S.W.2d 354 (Tex. App.-El Paso 1993, no writ), which is also cited by claimant, is a case involving a "special mission" at the direction of the employer. Whether the deceased was on a special mission at the direction of Trucking Company or whether he was simply fulfilling his responsibility under the lease agreements as owner of the leased truck to have the truck repaired was a fact question to be determined by the hearing officer as the trier of fact. The hearing officer found that on _____, the deceased was not driving a truck "for" Trucking Company, but instead was in the process of repairing one of his leased trucks as was his responsibility under the lease agreements.

The hearing officer is the trier of fact in a CCH and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer can believe all, part, or none of the testimony of any witness and judges the credibility of the witnesses. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. As the finder of fact, the hearing officer resolves conflicts in the evidence. An appellate 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 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Elaine M. Chaney
Appeals Judge