APPEAL NO. 991610

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 6, 1999, a hearing was held. In regard to the only issue before her, she determined that respondent (claimant) is the employee of (employer). Appellant (carrier) asserts that claimant was an employee of (absent employer) but that there was no need for absent employer's employees to be supervised on a day-by-day basis so absent employer's absence was irrelevant; carrier also quotes from a contract between employer and absent employer concerning cooperation in congested work areas, and stresses the existence of this contract. Carrier also states that there is no evidence that employer ever paid claimant and concludes by saying, "there was no great weight of evidence that clearly showed [employer] acted or reacted in a manner that would suggest [claimant] was an employee of their company."

DECISION

We affirm.

Claimant testified that he was injured on _____. There was no dispute as to the fact of injury. Claimant was working beside a street at a new construction site when a vehicle, whose driver apparently had an epileptic seizure (according to the police report), left the road and struck claimant, breaking his right leg and hip, along with causing multiple other injuries. (Extent of injury and disability were not issues before this hearing.)

Claimant testified that he had worked construction prior to this job. He said that he was interested when Mr. C approached him about a construction job because his current work had recently been decreased to 20 hours per week. He went with Mr. C to the work site where he then waited for the superintendent of the site, MA (M.A., according to Mr. F president of employer). MA arrived, identified himself as the superintendent for employer, and opened a trailer that was labeled as employer's. MA then requested identification, which claimant provided (apparently to address the status of an employee relative to citizenship). Claimant testified that MA gave him tools out of that trailer and proceeded to instruct him concerning putting up a perimeter line for the site. He said he marked off the perimeter line as MA instructed, adding that "we were starting out." Claimant said that when he had asked, he was told by Mr. C that he was going to work for employer; claimant said that MA also told him he was working for employer. Claimant described that he worked with MA and "Mr. L," who claimant described as a "helper." He said the only tools he ever used came out of the trailer labeled as employer's, except that MA did rent a motorized post hole digger when some problems with holes arose.

He said he filled out no application for work. Mr. C only took him to the site and then left; claimant never saw him again in the short time he worked prior to the injury. Claimant never identified anyone else at the construction site that was said to be working for absent employer. As stated, the injury occurred on _____, which is a Thursday; claimant testified that Mr. C picked him up, took him to the site, and he began working for MA on the

Wednesday of the preceding week. The hearing officer found that claimant appeared at the work site for work on September 30, 1998, there was no evidence to indicate otherwise, and carrier does not attack findings of fact that indicate claimant worked on that date, only attacking who claimant worked for on that date and thereafter.

Claimant also described no other contractors, subcontractors, or any other workers around causing congestion at the work site. As stated, his job initially was to put up a perimeter line. He testified that on _____, he had started putting in a grade on the perimeter line. MA had told him how to do the work, had told him to work from 7:00 a.m. to 5:00 p.m., and had told him when to take a lunch break. He had received no instruction from Mr. C at the only time he saw him on the first day he arrived to work.

Claimant said that he was measuring the grade when the car hit him on _____. He indicated that the workweek evidently ended on Wednesday because he had been paid once for one day's work. He added that he was paid by check but that then the check was "picked up" and cash was left in its stead. (Claimant's answers to interrogatories propounded by carrier include an answer to a question about wages paid by employer, which said, "[claimant's] spouse saw a check made payable to [claimant] from [employer], but the check was returned for cash.") Claimant testified that he never received any income tax information, such as a W-2, from either employer or absent employer at the end of the 1998 work year.

The contract between absent employer and employer was dated October 1, 1998, the day after claimant began work. It does not purport to be a contract to provide labor, such as seen in contracts involving employee leasing, and contains no clause addressing who has the right to control workers at the job site. The contract does require absent employer to provide a superintendent or foreman "in attendance"; it also requires absent employer to procure and maintain workers' compensation insurance "prior to starting work." Employer does agree in the contract to allow absent employer to use its tools.

The hearing officer also found that MA was employer's employee, not absent employer's employee, and that finding was not appealed. Therefore, with no evidence of any foreman or superintendent of absent employer on site, no finding of fact was required that would indicate that absent employer borrowed any tools from employer on behalf of any of its employees. We note that neither Mr. C nor anyone else identified as an employee or representative of absent employer provided any testimony, any written statement, or any other documents for this hearing. There was no evidence from absent employer that claimant was its employee; there is no evidence from absent employer that it ever in any way directed claimant in his work; and there is no evidence from absent employer that it had the right to control claimant in his work.

The contract between employer and absent employer, made on October 1, 1998, after claimant had begun work, also said that employer would provide "control lines and bench marks as required."

Mr. F, president of employer, said in an unsigned statement, with a date of June 15, 1999, thereon, that claimant was employed by absent employer. He also said that this job started "around December of 1998." He said that the "contract was formed (before he [absent employer] ever did any work) as to what his duties . . . ." Mr. F said that the contract required absent employer to provide workers' compensation insurance; he also said he had worked with Mr. C in the past--after which the next question was, "[h]ad he furnished workers' compensation insurance for his employees at that time during . . . ," to which Mr. F answered, "I'll bet he's had it in the past at sometime." He added that Mr. C supervised absent employer's workers himself. He also agreed that MA, his superintendent, would communicate with Mr. C or his foreman, not with absent employer's "individual employees." Mr. F said that employer had not issued a check to claimant "on this job." He also stated that he felt "[claimant's] attorney is just trying to arrange facts to get himself a fee."

A question regarding identity of the employer is a factual matter for the hearing officer to make; it generally depends upon the right of control relative to the claimant involved. *See* Texas Workers' Compensation Commission Appeal No. 92172, decided June 17, 1992. Gibson v. Grocers Supply Co., Inc., 866 S.W.2d 757 (Tex. App.-Houston [14th Dist.] 1993, no writ), states basically the same criteria in saying that the employer is the company who has the "right of control of the details and manner" of the work. *Also see* Texas Workers' Compensation Commission Appeal No. 971310, decided August 25, 1997, another case in which there was no evidence of a claimant "operating under the control or direction" of one of the two companies considered in determining the identity of employer.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Her findings that claimant went to the job site on September 30, 1998, where he was interviewed by MA, an employee of employer, were not appealed. She also found that MA instructed claimant daily as to how to do the work, the hours to work, and provided work tools to claimant. This finding was questioned on appeal by carrier asserting that Mr. F said that MA did not direct claimant's work, that the contract between employer and absent employer "was clear" as to the scope of work, and that absent employer's employees did not "require day-to-day supervision." The hearing officer was sufficiently supported in finding that MA instructed claimant daily based on claimant's testimony, the absence of any contradiction by MA, the absence of any contradiction by Mr. C or by any other employee of absent employer, by the contract between employer and absent employer which said that absent employer would have a superintendent or foreman on the site (as indicative that absent employer's employees did need some supervision), and by the contract between employer and absent employer which said that employer would "furnish control lines and bench marks" (which the hearing officer could reasonably infer was what claimant was doing at the time he was injured). She could give this evidence more weight than she did that of Mr. F who said that MA did not direct claimant.

Carrier also disagrees with a finding of fact that said Mr. C was not at the job site after the first day and that he did not supervise claimant, set hours for claimant, or provide tools for claimant, saying that since there was a contract between employer and absent employer it was "irrelevant" whether Mr. C was at the site. Carrier also indicated that Mr. F

said the absent employer could borrow a tool. The hearing officer could give weight to claimant's testimony that said absent employer was never there after the first day and to the absence of any evidence from absent employer. The contract, which carrier cites, contradicts carrier's argument that it was "irrelevant" whether absent employer was present or not, since that contract requires the presence of a foreman or superintendent of absent employer in regard to absent employer's employees. The finding of fact that absent employer did not supervise claimant was sufficiently supported by the evidence.

Another finding of fact as to control exercised by MA on behalf of employer is addressed by the discussion previously provided about MA controlling claimant's daily work. Based on the evidence and the prior findings of fact, discussed herein, the hearing officer's findings of fact that claimant began work for employer and was the employee of employer on _____, when injured are sufficiently supported by the evidence.

Contrary to carrier's assertions, there was some evidence that claimant had been paid by check by employer. In addition, questions of fact are determined by the hearing officer, as fact finder, not on the basis of what the "great weight" shows "clearly," but on the basis of a simple preponderance of the evidence.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Judy L. Stephens
Appeals Judge