APPEAL NO. 991897

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 August 3, 1999. The issues at the CCH were whether the appellant/cross-respondent (claimant) sustained a compensable injury in the form of an occupational disease, the date of such injury, whether (O&A) was the claimant's employer for purposes of the Texas Workers' Compensation Act, and whether the claimant had disability. The hearing officer determined that the claimant did not sustain a compensable injury in the form of an occupational disease; that the date of the claimed injury is _____; that O&A was the claimant's employer for purposes of the Texas Workers' Compensation Act; and that the claimant did not have disability as a matter of law because she did not sustain a compensable injury. The claimant appeals, urging that the medical evidence establishes that she has carpal tunnel syndrome (CTS); that disability should be from _____, through June 11, 1999; and that evidence excluded by the hearing officer should be considered. The respondent/cross-appellant (carrier) replies that the hearing officer did not abuse her discretion in excluding a claimant's exhibit and that the hearing officer's decision is supported by sufficient evidence. The carrier filed a conditional appeal asserting that a decision should be rendered that O&A is not the claimant's employer for purposes of workers' compensation. The appeals file does not contain a response to the carrier's conditional appeal from the claimant. The finding that the date of the claimed injury is _____, has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The Decision and Order of the hearing officer contains a thorough summary of the evidence. Only a brief summary of the evidence will be contained in this decision. The claimant, a computer programmer, testified that she sent her resume to O&A, a company which provides assistance in obtaining work. On June 19, 1998, the claimant signed a contract with O&A and O&A sent her to provide computer programming services to (BC/BS) from June 22, 1998, through October 2, 1998. The claimant submitted the hours that she worked at BC/BS to O&A and O&A issued a paycheck to a company owned by the claimant's husband, (T&E). The claimant chose to be paid a higher hourly rate and receive a 1099 federal income tax form from O&A instead of wages. The claimant testified that O&A assigned her a supervisor who worked for BC/BS, but that O&A maintained all control other than on-site supervision. BC/BS gave the claimant instruction on what to do, set her work hours, and furnished the equipment. The claimant did not receive any benefits from O&A.

The claimant's contract with O&A designated the claimant as an employee and O&A as an employer. It provided that the client (BC/BS) would supervise the claimant in the

workplace, but that O&A retained all responsibility for hiring and termination, salary, and any other reviews the claimant might receive during the course of an assignment. The contract also contained a confidentiality agreement whereby the claimant could not disclose any client (BC/BS) information to O&A or others. O&A had a contract with BC/BS which provided that O&A at all times had the right to control and had actual control of all means, methods, procedures, and sequences necessary to perform and coordinate the performance of its obligations. It also provided that O&A would supervise and direct the performance of its obligations using the highest skill, judgment, and attention of O&A's profession.

The issue of whether an injured worker is an employee or an independent contractor "depends upon whether the purported employer has the right to control the individual in the details of the work to be performed." Texas Workers' Compensation Commission Appeal No. 950075, decided February 28, 1995. To analyze whether a person is an employee or an independent contractor, courts consider the independent nature of the worker's business; the worker's obligation to furnish necessary tools, supplies and materials to perform the job; the worker's right to control the progress of the work except as to final results; the time for which the worker is employed; and the method of payment, whether by the unit of time or by the job. *See* INA of Texas v. Torres, 808 S.W.2d 291, 293 (Tex. App.-Houston [1st Dist.] 1991, no writ). Whether an injured worker was an employee or an independent contractor is a question of fact, determined in part by considering right to control. Goodnight v. Zurich Insurance Co., 416 S.W.2d 626 (Tex. Civ. App.-Dallas 1967, writ ref'd n.r.e.). In determining this fact, it is necessary to examine evidence not only as to the terms of the contract, but also evidence with respect to who exercised control or such evidence that is relevant as tending to prove what the contract really contemplated. Halliburton v. Texas Indemnity Insurance Company, 147 Tex. 133, 213 S.W.2d 677, 680 (1948). Texas Workers' Compensation Commission Appeal No. 960147, decided March 5, 1996, quoted the Texas Supreme Court in Thompson v. Travelers Indemnity Co. of Rhode Island, 789 S.W.2d 277, 278-279 (Tex. 1990), stating:

> The test to determine whether a worker is an employee or an independent contractor is whether the employer has the right to control the progress, details and methods of operations of the employee's work. [Citation omitted.] . . . The employer must control not merely the end sought to be accomplished, but also the means and details of its accomplishment as well. [Citation omitted.] Examples of the type of control normally exercised by an employer include when and where to begin and stop work, the regularity of hours, the amount of time spent on particular aspects of the work, the tools and appliances used to perform the work and the physical method or manner of accomplishing the end result. [Citation omitted.]

The hearing officer found the evidence sufficient to support a finding that the claimant was an employee of O&A and not an independent contractor. She noted that O&A did not assert that the claimant was the borrowed servant of BC/BS. The carrier

argues that the claimant was an officer of T&E, utilized T&E's tax I.D. number, modified her agreement with O&A to be given a 1099, and had the right to work for other employers. These were factors that were considered by the hearing officer. The hearing officer resolved, based on the evidence, that O&A had the right to control the details and methods of the work performed by the claimant. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We have reviewed the evidence and the hearing officer's determinations and conclude that her determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

The claimant testified that her right arm hurt while she worked at BC/BS, but she thought that the pain was due to arthritis. The claimant's job with BC/BS ended on October 2, 1998, and the claimant was not given another assignment by O&A. The claimant has not worked since October 2, 1998. On November 2, 1998, the claimant sought medical treatment from Dr. G with complaints of right shoulder pain. Dr. G diagnosed rotator cuff tendinitis and shoulder impingement, and noted that the claimant denied any numbness or tingling in her arms. On _____, the claimant returned to Dr. G. He noted that the claimant was having numbness and tingling in her right upper extremity, her forearms were aching, she had "recently had a spill," she had been doing a lot of lifting of her grandchildren, and she had been spending a considerable amount of time working on a computer on a regular basis. Dr. G assessed CTS, right tennis elbow, and resolving right shoulder impingement. The claimant testified that the "spill" referred to in Dr. G's notes concerns a slip and fall she sustained between the November and December 1998 doctor visits.

An EMG performed on both upper extremities on January 15, 1999, was normal. Consequently, Dr. G referred the claimant to a rheumatologist, Dr. C. Dr. C opined that the claimant's "[CTS] symptoms may well be due to some mild arthritic involvement related to discoid lupus." On April 20, 1999, Dr. G wrote a letter to the Texas Workers' Compensation Commission stating that the claimant's current problems and issues are those associated with repetitive-use types of activities, that the claimant has a history of repetitive activity with computer programming, and that he suspects her work is the cause. The carrier presented a peer review report which indicates that, based on the claimant's EMG, she does not have CTS.

The claimant had the burden to prove that she sustained an occupational disease, CTS. Whether she did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Although a diagnosis of CTS must be based on expert medical evidence, we have routinely held that

the cause of CTS can be established by the testimony of the claimant alone if found credible by the hearing officer. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 961008, decided July 1, 1996; and Texas Workers' Compensation Commission Appeal No. 941077, decided September 26, 1994. The hearing officer found that the claimant's evidence was insufficient to support a finding of CTS. In reaching her determination, the hearing officer states:

> Claimant has right arm pain, most specifically in the right shoulder and forearm. Pain by itself is not an injury. EMG studies were negative. Clinical findings were all negative for Tinel's and Phalen's sign except for one time. Further, Claimant's symptoms of numbness and tingling did not arise until after she sustained a non-work related slip and fall. [Dr. G] offered other causes for the symptoms in addition to overuse and [Dr. C] opined that her symptoms may be associated with arthritic involvement related to discoid lupus. Claimant did not follow-up on his recommendation for further diagnostic testing. The record is simply inconclusive as to whether Claimant has [CTS].

There was conflicting evidence presented as to whether the claimant has CTS. When conflicting medical opinion is presented, it is for the hearing officer to resolve such conflicts. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). A hearing officer can give consideration to the basis shown for an expert's opinion. After review of the record, we find there was sufficient evidence to support the hearing officer's determination that the claimant did not sustain a compensable injury in the form of an occupational disease.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The claimant requests that Claimant's Exhibit No. 8 be considered. The hearing officer excluded Claimant's Exhibit No. 8 on the basis that it was not timely exchanged and no good cause was shown for failure to timely exchange. Evidentiary rulings by a hearing officer on documents which are admitted or not admitted are generally viewed as being discretionary and will be reversed only if there is an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. In determining whether there is an abuse of discretion, the Appeals Panel looks to see if the hearing officer acted without reference to any guiding rules or principles. Appeal No. 941414. The hearing officer did not abuse her discretion in ruling that the claimant had failed to timely exchange Claimant's Exhibit No. 8 and did not have good cause for failure to timely exchange. Even if the hearing officer had erred in not admitting Claimant's Exhibit

No. 8, the error would not have been reversible error because there is no showing that not admitting the document was reasonably calculated to cause and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge