

APPEAL NO. 000105

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 29, 1999, a contested case hearing (CCH) was held in (city 1), Texas. At issue was whether the appellant (claimant) was an employee of the respondent's (carrier) insured at the time of his injury on _____; the claimant's correct average weekly wage (AWW); whether he had disability; and whether he was entitled to receive lifetime income benefits (LIBS).

The hearing officer held that because the work performed for the employer was intermittent and irregular, a fair, just and reasonable method should be used, which would result in an AWW of \$35.00 per week. The hearing officer further held that while the claimant obviously had "disability," he was not demonstrated to have qualified for LIBS. However, the hearing officer held that the claimant was an independent contractor when injured; she noted that the fact that he did not employ others to assist, nor furnish his own tools was "insignificant," and that the control retained over the claimant by the employer was only "general control."

The claimant has appealed, and argues that the determination that the claimant was not an employee of the employer at the time of his accident is against the great weight and preponderance of the evidence. The claimant argues that the fair, just and reasonable pay should be found to be \$10.00 per hour, not \$35.00 per week. The findings against LIBS are appealed on the basis that claimant is "totally and permanently disabled." The determination that the claimant had disability has not been appealed. The carrier's counsel asserts that the entire appeal should be stricken because he was not served with a copy. The carrier argues that there is no issue regarding total and permanent disability and this point of error should be disregarded. The carrier argues that Texas Workers' Compensation Commission Appeal No. 982164, decided October 22, 1998, controls the decision in this case. The carrier argues that the fact findings of the hearing officer are supported by the record.

DECISION

Affirmed in part, reversed and rendered in part.

We will not fail to consider the timely filed appeal of the claimant in this instance because the carrier's attorney was not provided with a copy; our consideration of the response of the carrier offsets any harm that was caused. We find no authority for striking a timely filed appeal due to failure of service.

The claimant was unable to testify due to the severity of his injuries. His wife testified instead. The claimant sustained injuries, including a head injury, on _____, while driving a car for (referred to herein as the employer or the dealership). He was 67 years old at the time. He was in a coma for three and one-half days. She said that he had

made deliveries of vehicles for the dealership off and on for about two and one-half years before the injury. She said that at that time, because her husband could not write well, she had assisted him in filling out applications for both the dealership and another automobile dealer, but that he never made deliveries for the other dealer. While she agreed that her husband had not worked for the dealership on a 40-hour-a-week basis, she was unable to recall or did not know many aspects of how he would come to make deliveries. She understood that he was paid \$10.00 an hour when he did make deliveries. She did not believe that taxes were taken out and did not know any of the details of any tax returns that had been filed. She testified that she was not allowed to accompany him on any trips.

The claimant's wife testified that he was a volunteer fireman and also worked a job three nights a week from 11:00 p.m. until 7:00 a.m. for a gambling enterprise at the time of his injury. She said that when he was contacted by the dealership to make a delivery or pickup, he never turned down the job. Claimant's wife and a friend, Ms. C, stated that when claimant was in the hospital, the owner of the dealership, Mr. HS, came to the hospital and assured claimant's wife that everything would be covered through workers' compensation. The claimant's wife said her husband now required constant supervision and was not the same man she married.

It was brought out that the hearing officer denied claimant's requested subpoena two weeks prior to the CCH for records maintained on the claimant by the dealership. Furthermore, the carrier took the position that it did not have to respond to a request for production filed by the claimant since it was not endorsed or ordered by the hearing officer. However, our review has not been directed to these actions by any assertion of error.

Mr. HS was not present at the hearing. His son, Mr. HJ, deferred specific answers to some questions to Mr. HS, such as the duration of the claimant's employment. He testified that applications were not taken from drivers but that new drivers were simply referred by existing drivers. Mr. HJ said at first that driving records would not necessarily be checked and maintained that little, if anything, was done after the referral to investigate the backgrounds of the persons who would be driving the dealership's cars. However, he eventually testified that driving records were indeed checked to assure that they were not putting unsafe drivers on the road. Mr. HJ stated that the company used the services of approximately 15 drivers.

Mr. HJ said that drivers would be contacted on an "as needed" basis to drive cars for dealer exchange, drive cars to auction, or pick up other drivers. He said that when claimant was called, he would report to the dealership within 15 or 20 minutes for further instruction, which was given by the dealership. The dealership furnished all cars used, which were insured through the dealership. If claimant went to pick up another driver, he used a dealership car, not his own car, which the dealership did not insure. Mr. HJ argued that he had produced all pay records he was able to find in a file maintained on claimant; these ran from December 1998 through April 1999. Mr. HJ actually described the pay tickets as

"invoices" and said that he prepared them.¹ Mr. HJ said that if a driver were late picking up another driver because he had attended to a personal errand, he would likely not be asked to drive again.

Mr. HJ denied that the drivers were paid by the hour, stating that they were instead paid per trip mileage according to mileage charts in existence (but not produced for the CCH). He did agree that if the driver had to wait, he was paid \$5.00 an hour waiting time. All pay tickets in evidence show that claimant was paid a rate expense in multiples of \$10.00, usually \$20.00 or \$30.00. Eight trips were taken prior to the injurious one, with the last such trip being taken on April 29, 1999. Mr. HJ agreed that he lived in the same apartment complex as the claimant and that shortly before _____, claimant told him that he was available for more driving runs. Mr. HJ said that drivers were not specifically told what route to take, although they were expected to take the shortest and most direct route. Most trips were to the (city 2) area around one airport.

In an interview with the adjuster, Mr. HJ stated that drivers were usually retired persons trying to do extra work and they were considered contract labor, ineligible for employment benefits. Mr. HJ said no taxes or Social Security was withheld, and no 1099 form was issued because claimant was paid less than \$600.00.

The claimant's medical records indicated he had a closed-head injury and a small skull fracture. He was treated by Dr. L, who wrote on August 4, 1999, to state that claimant had decreased memory and cognitive function. A July 26th MRI of the claimant's brain showed several hemorrhages of various sizes. The claimant took medication for seizure control. A brief letter from Dr. B dated in September 1999 briefly states that claimant is "totally disabled."

First, we can affirm the hearing officer's decision that the claimant did not prove entitlement to LIBS. There are no awards of LIBS for global "total and permanent disability." The circumstances under which LIBS entitlement may be found are set forth in Section 408.161. To receive LIBS as a result of his traumatic injury to the brain, the evidence must establish "incurable insanity or imbecility." Section 408.161(6). As the decision notes, the medical evidence somewhat inexplicably ends a few months before the CCH and, although the claimant's injury was obviously severe, we cannot agree that the hearing officer erred in finding that the evidence produced did not establish the statutory standards for LIBS entitlement. We affirm this portion of her decision.

Second, we affirm the hearing officer's computation of the claimant's AWW. In this regard, we stress that income benefits are not based upon findings of hourly pay rates, but upon "average weekly wage" (emphasis added). See Section 408.103(a). The burden of

¹ After the CCH, the claimant produced additional pay stubs to show that claimant's work for the dealership went back two years before 1999, but the hearing officer stated that these were not considered since they could have been produced timely.

proving the AWW is on the claimant. Texas Workers' Compensation Commission Appeal No. 92119, decided May 4, 1992, *citing Texas Employers' Insurance Association v. Bragg*, 670 S.W.2d 712 (Tex. App.-Corpus Christi 1984, writ ref'd n.r.e.). The hearing officer appears to have believed that the claimant was likely paid \$10.00 an hour. There was no evidence, however, that claimant had a regular schedule or was a full-time employee in any respect. The deliveries he did in the six months prior to the injury were few, and almost nil in the 13 weeks prior to his injury. This irregularity is one aspect that the fair, just and reasonable method of Section 408.041(c) is used to address. There is no basis for a greater AWW because of the loss of concurrent employment, as the AWW can only be based on the employment in which one was engaged at the time of injury, not any co-employment held that the time for other employers. Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991.

While the existence of an independent contractor relationship versus an employer/employee relationship is typically a determination of fact, we will reverse such fact determinations if against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust. *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951). We agree that the great weight and preponderance of the evidence is against the hearing officer's determination that the claimant was an independent contractor at the time of his serious injury, and accordingly reverse that determination and render a decision that the claimant was the employee of the dealership for purposes of workers' compensation, and that the carrier is liable for income and medical benefits.

To the extent that control over the worker is reviewed to determine an injured worker's status, it is the right to exercise control rather than the actual exercise of control which is determinative. Texas Workers' Compensation Commission Appeal No. 950075, decided February 28, 1995. Issuance of paychecks and withholding of taxes is not conclusive. *Mayo v. Southern Farm Bureau Casualty Insurance Company*, 688 S.W.2d 241 (Tex. App.-Amarillo 1985, writ ref'd n.r.e.). Texas Workers' Compensation Commission Appeal No. 982164, decided October 22, 1998, does not stand as authority for the decision in this case as the facts of that case are plainly distinguishable. The worker in that case established his own schedule, provided all of his own tools and transportation, and operated only under general direction to maintain and repair various natural gas compressors and units.

Of greater guidance and directly applicable to the facts of this case is Appeal No. 950075, *supra*, which quotes *Keith v. Blanscett*, 450 S.W.2d 124, 128 (Tex. Civ. App.-El Paso 1969, no writ) (the *Blanscett* case). As set out by the El Paso Court of Appeals, quoting authority from another jurisdiction:

One delivering an automobile . . . necessarily surrenders all control over the details of the transportation, but it is not to be presumed that such control is surrendered by one who delivers an automobile which he owns or has a lien upon to one who is the drive it to a distant point and there deliver it to some designated person. It is not a natural inference to assume that the one who

is to drive it is at liberty to run at a rate of speed which would injure the car . . . or otherwise operate the car in such a manner as to injure it. These are details of the work to be done, and the evidence fails to show such surrender of control, as would necessarily render [the worker] an independent contractor in undertaking to drive the car [from City A to City B].

The court further considered as critical that driving a car between two points did not constitute a special skill or expertise. It cited from numerous other jurisdictions where it has been held that automobile delivery people, while not regular employees, were nevertheless considered as employees if injured while in the course of making such delivery.

The 1989 Act offers guidance in analyzing such contractual relationships. Section 406.122 states that a person who performs work or provides a service for a general contractor who is an employer will be considered an employee of that general contractor unless the person either works for or is operating as an "independent contractor." It appears from this statute that one who is furthering the affairs of another is thus considered to be an employee unless the contrary is proven. Section 406.121(2) defines independent contractor as one who ordinarily:

- (A) 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;
- (B) 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;
- (C) is required to furnish or to have employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and
- (D) possesses the skills required for the specific work or service.

In this case, it was undisputed that claimant was furthering the business affairs of the dealership at the time of his accident. While claimant was not a regular employee of the dealership, the undisputed evidence was that he was called to be a day laborer as needed, whereupon he would report to the dealership within 15 or 20 minutes, and was told then and there when he reported where to go to pick up a driver or a car or deliver same. The claimant was provided with a cell phone by the employer for emergency use. He was given the vehicle selected by the dealership, even if picking up another driver. If claimant went in a convoy with other drivers, the dealership selected the vehicle that would be used to transport all drivers back. Mr. H testified that the employer had a general mileage chart used to compensate the drivers based upon destination and that drivers would be expected to take the most direct and shortest route. The dealership maintained liability insurance on

the vehicles used for the service.² The dealership checked the driving records of prospective drivers. If there is an aspect of performing the job that could be deemed as "insignificant" in the independent contractor analysis, it would be the "choice" of the claimant to take road A or road B, or to make a brief stop for personal needs. The fact that the dealership did not directly exert supervision while claimant was on the road does not constitute a surrender of the right of control over the activities and method of performing the job, just as noted by the court in the Blanscett case. There would appear to be few alternative routes, in any case, between the dealership and city 2 that would require an exercise of discretion. The great weight and preponderance of the evidence established that the dealership retained the right to control claimant's actions.

While the hearing officer in this case points out that claimant was subject to only "general control" by the dealership, it is not apparent what more meaningful control claimant could have been subject to.

While the carrier argued that the claimant was paid by the job as proof of his independent contractor status, the additional hourly payment for "waiting time" is evidence that the manner and timing of performing the delivery jobs was not solely within the determination of the claimant. He was expected to deliver a particular vehicle, or pick up a driver, at a particular time, and if for some reason an unforeseen wait occurred, he was paid for it by the hour, over and above the "per job" compensation.

We also observe that a finding that claimant was an independent contractor might not necessarily foreclose carrier liability under the facts of this case. See Section 406.123(b). *Also see Texas Workers' Compensation Commission Appeal No. 92605, decided January 14, 1993.*

² While it could have been more clearly developed, the existence of liability insurance in the name of the dealership is evidence that the insurable interest and the right to control operation of these vehicles rested ultimately with the insured/dealership.

For these reasons, we affirm the determinations of the hearing officer as to LIBS and AWW, and reverse and render a decision that the carrier is liable for income and medical benefits because the claimant was the employee of the employer/dealership at the time of his injury.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge