APPEAL NO. 000268

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 January 14, 2000. The hearing officer determined that the respondent (claimant) was an employee of the appellant (self-insured) at the time of the claimed injury to the right elbow on _____, and that the claimant had disability beginning on August 6, 1999, and continuing through the date of the hearing. The self-insured appeals these determinations, contending that they are contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant fell from a scaffold while painting a room in the self-insured's high school. As a result of the fall he fractured his right elbow. At issue in this case is whether at the time of the fall he was an independent contractor or an employee of the self-insured. No written agreement covered the relationship between the claimant and the self-insured. Nonetheless, the background facts are largely undisputed.

The claimant was paid on an hourly basis to paint the interior of the school. He filled out a time card to account for the hours spent on the job. The paint and supplies, including the scaffold, were furnished by the self-insured. He could only work during the hours the school building was open and every two weeks he received a check for the time spent. No other benefits were provided by the self-insured, although the claimant was asked to supply his social security number. He did not complete a job application. He said that he was told everyday by the self-insured which rooms he was to paint as well as being advised on painting trim, what to tape, and what to paint free hand on some things. He did not believe he was free to hire additional help. The work had already been started and he was engaged to replace an unsatisfactory painter. He also said there was no requirement on the number of hours he had to put in and was told that this was a temporary job. He also admitted that he was told that if he did a good job he would likely be hired by the self-insured.

Mr. D, the director of maintenance, testified that the claimant called him about a painting job and he was told he could have a "temporary job" to be paid hourly and, if this worked out, the self-insured "would continue to use him." He believed he explained to the claimant that a full-time employee position was not funded at the time. He further testified that no benefits were promised beyond the $10.00 per hour and no personnel file was created for the claimant. Mr. D said that the claimant was paid on an hourly basis, not a job, because there were other people painting in the same area under the same

circumstances and it would be impossible to attribute the job to any individual. He further said that no supervisor was assigned to the claimant, that he was not told how to do the job, and that once or twice a day he would check up on the claimant. He did not tell him when to take breaks or go to lunch. Ms. K, the business manager, testified that she did not put the claimant on the payroll, but paid him pursuant to a purchase order. She also said that he filled out no application and no background check or preemployment physical was done on him as would be normal before hiring an employee.

The 1989 Act limits liability for compensation to one who is an employee. Section 406.031(a); Texas Workers' Compensation Commission Appeal No. 91005, decided August 14, 1991. As the Appeals Panel noted in Texas Workers' Compensation Commission Appeal No. 91115, decided January 29, 1992, the1989 Act (Section 401.012) defines "employee" as each person in the service of another under a contract of hire, express or implied, oral or written, but not including an independent contractor or employee of an independent contractor. We further noted that "the Texas Supreme Court has stated that the solution to the question of whether an injured person was an employee or independent contractor at the time of the injury is reached through determining whether the purported employer had the right of control over the work. [Citation omitted.]"

Sections 406.121(1), (2) and (5) define, respectively, a general contractor, an independent contractor, and a subcontractor. The Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 93110, decided March 26, 1993, that whether an individual 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. [Citation omitted.]" This decision went on to state that "[w]here no contract between the parties establishes the employer's right to control the work, the employee-employer relationship may be established circumstantially by evidence of actual exercise of control. [Citation omitted.]" We noted that, in many respects, the 1989 Act's definition of independent contractor incorporates the common-law factors the courts have looked to in analyzing one party's right to control the details of another's work. We stated that such factors may include the independent nature of the worker's business; the worker's obligation to furnish the necessary tools, supplies, and materials to perform the job; the worker's right to control the progress of the work except as to the final results; the time for which the worker is employed; the method of payment; whether the worker could come and go; whether income taxes were withheld; and whether the work required special skill. We further stated that it does not appear that each and every evidentiary factor in the statutory definition need be present and that each controversy involving whether an injured worker is an employee or independent contractor must be decided on its own particular facts and that, ordinarily, "no one feature of the relationship between the worker and the employer is determinative. [Citation omitted.]" Whether a claimant is an independent contractor or employee is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 991200, decided July 22, 1999.

The hearing officer considered this evidence and determined that the claimant was an employee, that is, that the self-insured maintained control over the claimant's work. Finding of Fact No. 8. As noted above, most of the background facts of this case were not disputed and the resolution of the disputed issue became largely a matter of what inferences and conclusions the hearing officer would draw from this evidence. A significant amount of time at the CCH concerned the temporary nature of the job. We would observe that whether a job is expected to be over soon or last for quite a while has little bearing on the question of whether the claimant is an employee or independent contractor. At best, it is one among the many factors, none of which is necessarily controlling in and of itself. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). While another hearing officer may have found otherwise, we conclude that the decision of this hearing officer has sufficient evidentiary support in the record and for this reason we decline to reverse it on appeal.

The self-insured appeals the disability determination on the basis that the injury was not compensable. Having affirmed the finding of a compensable injury, we also affirm the finding of disability.

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge