APPEAL NO. 022929
FILED JANUARY 6, 2002

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 October 14, 2002. The hearing officer resolved the disputed issues by deciding that respondent 1 (claimant) sustained a compensable injury on _____; that (employer) was the claimant's employer for the purposes of the 1989 Act at the time of the injury; that the appellant (carrier), who was the workers' compensation carrier for the employer at the time of the claimant's injury, contested the injury in accordance with Section 409.021 and has not waived its right to dispute compensability of the injury; and that the carrier is not relieved of liability under Section 409.002 because the claimant timely notified the employer of the injury. The carrier appealed, contending that the claimant was not an employee of the employer at the time of the injury, but instead was an independent contractor. The claimant and respondent 2, the (self-insured), responded. There is no appeal of the hearing officer's determinations that the claimant sustained a compensable injury on _____; that the carrier has not waived the right to dispute compensability of the injury; and that the claimant timely notified the employer of his injury.

DECISION

The hearing officer's decision is affirmed.

The claimant is a uniformed police officer for the self-insured. The employer hired subcontractors to do a turnaround project at its refinery. The employer created a temporary parking lot for the subcontractors. The temporary parking lot was somewhere between 300 feet and a quarter of a mile from the intersection of two public roads. Because of the increased number of workers, the employer determined that it needed to have uniformed police officers to do traffic control at the intersection in order to facilitate ingress to and egress from the temporary parking lot. The employer hired several of the self-insured's uniformed police officers, including the claimant, to perform the traffic control at the intersection during the police officers' off-duty hours. The police officers obtained the permission of the self-insured's police department to perform the traffic control at the intersection in their police uniforms during their off-duty hours. There was no written contract for the traffic control work. The police officers were hired by the employer on an individual basis through the assistance of another police department employee who was paid by the employer for coordinating the hiring of the police officers. The employer determined the location the traffic control was to be done, that is, the intersection that was close to the temporary parking lot. The employer also determined the hours that the traffic control was to be performed; two hours in the morning and two hours in the evening. The employer paid the police officers with individual checks without any deductions. The employer issued the police officers a Form 1099-MISC for tax purposes. The employer initially thought one police officer would be sufficient for each shift, but after talking with the coordinating police

department employee, agreed that two police officers would be needed for each shift. The claimant and several other police officers had already been working for the employer during off-duty hours to provide uniformed gate security after September 11, 2001.

The morning of _____, the claimant and another uniformed police officer were performing traffic control at the aforementioned intersection. It is undisputed that the traffic control that the claimant was performing at the intersection that morning was the work that he was hired to do by the employer. On that morning, an employee of a subcontractor drove out of the temporary parking lot and struck the claimant with his vehicle while the claimant was in the intersection performing the traffic control work the employer hired him to do. It is undisputed that the claimant sustained an injury in that accident.

One of the disputed issues at the CCH was "Was the [self-insured] or [employer] the Claimant's employer for the purposes of the [1989 Act] or was the Claimant an independent contractor at the time of the claimed injury?" The carrier appeals the hearing officer's determination that the employer was the claimant's employer for the purposes of the 1989 Act. The carrier contends that under the holding of Hoechst Celanese Corporation v. Compton, 899 S.W.2d 215 (Tex. App.-Houston [14th Dist.] 1994, writ denied), the claimant was an independent contractor at the time of his injury. The claimant and the self-insured both seek affirmance of the hearing officer's determination. No party contends on appeal that the self-insured was the claimant's employer at the time of his injury and no party contends that the hearing officer erred in not finding that the self-insured was the claimant's employer at the time of his injury. Consequently, we do not address whether the self-insured was the claimant's employer at the time of his injury. We do note that there is a provision in the self-insured's police department's manual on off-duty employment that warns that workers' compensation benefits provided by the self-insured may not be available to officers working outside employment, and that police officers are advised to determine what coverage is available to them from their outside employer.

In the Compton case, an automobile driver brought an action for negligence against a chemical plant and off-duty police officers who had been hired by the chemical plant to direct traffic on a street outside the chemical plant, for injuries sustained in an automobile collision when a police officer waived a driver through the intersection. The jury found that the police officers were employees of the chemical plant. The court reversed and rendered, holding that the police officers were independent contractors and on that basis, the chemical plant could not be liable for their negligence. In reaching its decision, the court pointed out that every person who is found performing the work of another is presumed to be in the employment of the person whose work is being done, and that once that presumption is raised, the burden of proof shifts and the defendant has the burden to escape liability by establishing that the workman was an independent contractor. The court further noted that the standard tests for determining whether one is acting in the capacity of an independent contractor measure the amount of control that the employer exerts or has a right to exert over the details of the work.

The court determined that there was absolutely no evidence submitted by the plaintiff to show that the chemical plant exercised any control over the police officers regarding the details of the traffic control, and that the evidence showed that the only control exercised by the chemical plant over the police officers was to instruct them as to when and where they were to direct traffic and to ask them to wear their police uniforms. The court stated that the fact that the chemical plant exercised some general control or supervision over the police officers, e.g. time, place, and manner of dress, does not show that the chemical plant had the right to control the details of the work; that the evidence showed that the chemical plant exercised control over the officers for the purpose of seeing that the work was done at the right time and in the right place; and that that type of general control over an independent contractor does not result in making him or her an employee. The court concluded that there was no evidence to support the jury's finding that the police officers were employees of the chemical plant. One justice filed a dissent, stating that he would hold that the trial court was correct in submitting the issue of whether the police officers were independent contractors or employees to the jury, and that the jury's finding that the police officers were employees was supported by sufficient evidence. The Compton case was not a workers' compensation case.

The instant case is analogous to the Compton case in that there is no evidence that the employer exercised any control over the claimant regarding the details of the traffic control, and that the evidence showed that the only control exercised by the employer over the claimant was to instruct him (through the coordinating police department employee) as to when and where he was to direct traffic and to have him wear his police uniform. With regard to his instructions from the employer, the claimant said that the employer instructed him, through the coordinating police department employee, who was paid by the employer to perform the coordinating activity, that he and the other police officers hired by the employer were to move the cars to make sure people got to their jobs on time and to get them out of there on time.

The claimant responds that he does not meet the definition of an "independent contractor" in Section 406.121(2) because he asserts that he was paid directly by the employer; he paid no one nor acted as an employer; the employer directed how the services were to be performed, including the hours and location he would be directing traffic; and he was not free to determine the manner in which the work was done, the hours of labor, or any method of payment. The claimant also cites the definition of "employee" in Section 401.012 in support of the hearing officer's decision.

At the CCH, the self-insured argued that the employer was the claimant's employer for workers' compensation purposes at the time of his injury under Section 406.123(b), which provides:

> If a general contractor has workers' compensation insurance to protect the general contractor's employees and if, in the course and scope of the general contractor's business, the general contractor enters into a contract with a subcontractor who does not have employees, the general

> contractor shall be treated as the employer of the subcontractor for the purposes of this subtitle and may enter into an agreement for the deduction of premiums paid in accordance with Subsection (d).

Prior to its codification in the Texas Labor Code, Section 406.123(b) was TEX. REV. CIV. STAT. ANN. Art. 8308-3.05(l). We applied that provision in Texas Workers' Compensation Commission Appeal No. 92605, decided January 14, 1993, in affirming a hearing officer's decision that a claimant was the employee of an employer for workers' compensation purposes. In that case, the claimant, a police officer, worked an extra job as a flagman at a construction site. The employer contracted with a city to perform construction work and part of the contract required that, when needed, the employer must have a uniformed officer of the law at the project site for traffic control. The employer would obtain and pay the flagman and would be reimbursed by the city. The claimant was working the flagman job when he was injured lifting a barricade. The issue at the CCH was whether the self-insured city or the employer was the claimant's employer for workers' compensation purposes. The hearing officer found that the claimant was an independent contractor, who was a subcontractor to the employer on the date of injury, and decided that the claimant was an employee of the employer for workers' compensation purposes. In affirming the hearing officer's decision, we cited Article 8308-3.05(l) (now Section 406.123(b)), and stated:

> We have observed in a previous case that "[a]rticle 8308-3.05(l) contains a provision that is new to the 1989 Act, applicable to "single person" subcontractors; in essence, a small form of "mandatory" workers' compensation coverage is provided when a general contractor who has workers' compensation insurance enters into a contract with a subcontractor who does not have employees. That section provides that the general contractor will be considered as the "employer" of such a subcontractor for purposes of the 1989 Act, and may enter into an agreement with the subcontractor to deduct premiums paid." Texas Workers' Compensation Commission Appeal No. 91115, decided January 29, 1992. The limited nature of this provision is manifest. By contrast there is no similar provision that applies to single independent contractors serving as subcontractors in building and construction work as described in Article 8308-3.06, absent a written agreement.
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> We do not find persuasive the carrier's position that it was improper for the hearing officer to classify claimant as an independent contractor and as a subcontractor concurrently and that such dual classification "is not authorized under the statute and causes inherit (sic) conflicts within the statute . . . ." While there may well be authority indicating an individual cannot be both an employee and an independent contractor (Wasson v. Stracener, 786 S.W.2d 414, 420 (Tex. App.-Texarkana 1990, writ denied)), the definitions of the terms "independent contractor" and "subcontractor" in the 1989 Act (Article 3.05(a)(1) and (a)(5)) clearly indicate that an independent contractor can be (and probably frequently is)

> a subcontractor. Article 8308-3.05(c) specifically refers to the situation where a subcontractor operates as an independent contractor, although the basic concern of that subsection does not apply to this case. The effect of Article 8308-3.05(l) on the particular facts present here is to create, for purposes of workers' compensation coverage, the relationship of employer/employee.

We have previously stated that we will uphold a hearing officer's decision if it can be sustained on any reasonable basis supported by the evidence. Texas Workers' Compensation Commission Appeal No. 992174, decided November 15, 1999. In the instant case, the employer hired police officers, including the claimant, on an individual basis to perform the off-duty uniformed traffic control work the employer wanted done so that its employees and subcontractors would have an easier time getting to and from the temporary parking lot that the employer set up for the turnaround project at its refinery. In light of Section 406.123(b) and our prior application of that section in Appeal No. 96205, *supra*, we conclude that the hearing officer's decision that the employer was the claimant's employer for purposes of the 1989 Act is in accordance with the 1989 Act and is supported by sufficient evidence and is not 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 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBIN MOUNTAIN
VICE PRESIDENT OF ACE USA
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 200
IRVING, TEXAS 75063.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

CITY SECRETARY
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge