APPEAL NO. 91115
FILED JANUARY 29, 1992

On November 15, 1991, a contested case hearing was held. [The hearing officer] determined that the claimant, appellant herein, was not an employee of _____ (hereinafter called Insured) but worked as an independent contractor, at the time of his injury on (date of injury). The carrier, respondent herein, primarily argued at the hearing that appellant was a limited partner and not entitled to coverage under the policy it issued, although it also contended that he was an independent contractor. The appellant asks that we review the record and the evidence in this matter and find that he was an employee on the date in question, not an independent contractor or a partner, and entitled to coverage under TEX. REV. CIV. STAT. ANN., art. 8308-1.01 et seq. (Vernon Supp. 1992) (1989 Act). Respondent's response to the appeal concedes that appellant was injured while at work on a project, but agrees with the conclusion of the hearing officer and asks that it be affirmed.

DECISION

We reverse the decision of the hearing officer, and remand for development of further evidence on two issues: (1) the size of the structure on which [claimant] worked at the time of his injury so that it can be determined whether the 1989 Act, Article 8308-3.05 or 3.06 applies; and (2) development of evidence concerning the relationship between the appellant and Insured, such that a proper determination of appellant's status can be made.

Because of gaps in evidence, we cannot adequately evaluate all evidence and the factual basis for application of statutes recited in the hearing decision. The state of the record, most especially the lack of factual basis for application of Article 8308-3.06, requires further development in the interest of fairness to both parties. No testimony was given concerning the size and nature of the Aircraft Rescue and Firefighting Station, which was the structure on which appellant worked at the time of injury; the hearing officer applied Article 3.06 to the facts, although the structure seems not to be a residence and may be in excess of 20,000 square feet. Also, virtually no testimony was given by Insured's owner about the working relationship between his company and the appellant, aside from the assertion that he was paid by the job, and was considered by Insured to be a subcontractor, or a partner. Both parties focused on the perceived significance of a signed "limited partnership agreement" (which the hearing officer properly determined as having no bearing on the issues in the case) as absolving the respondent of liability, and much less so on the more critical evidence concerning appellant's actual on-the-job functions and status.

On October 15, 1991, a benefit review conference (BRC) was held; the unresolved issue is shown on the benefit review officer's report as "was [name of appellant] an employee or was he a partner of [name of insured]?"

A summary of testimony contained in the tape of the hearing and the exhibits presented indicate that the appellant was working with Insured on an airport-based fire station when he slid down a step on a scaffold on (date of injury).

Appellant described his work at the time of injury as "taping" of walls and joints. He provided his own undescribed "tools". (Copies of notebook paper documents described at one point by appellant as "receipts", indicate that Insured billed him for "mud and tape," and deducted these items from the amount paid to him, on the job in question as well as another). He also testified that "spraying", using a compressor furnished by Insured, was

part of the job performed. Insured's application for insurance through the assigned risk pool executed November 13, 1990 describes the business as one that "installs sheetrock and drywall in residences and small commercial buildings." Appellant testified that he was not told how to tape the walls, that he had 25 years experience doing this, but that he was instructed throughout performance of the job by Mr. S's brother as to matters that had to be redone or were not right. When he complained to Mr. S about this, he was told that the brother was the "superintendent." Appellant described his severance from the project as a layoff prior to completion of the airport job. He stated that he was paid by the week, and that his first week's pay was held back. Mr. S testified that appellant was paid by the job. One of appellant's exhibits, a copy of a piece of notebook paper, (which by and large went unexplained in the record), circumstantially indicates that some progress payments were made, as one amount is described as "paid to date" and it is slightly more than one-third of the total "job price."

Appellant testified that he initially was hired to work at the airport after going to Insured's office "looking for work." Appellant testified that he worked an eight-hour shift, from 7:00 to 3:30. A witness for claimant, (Mr. B), also went with him "to look for work." Mr. B testified primarily about the partnership agreements, although he did not see appellant sign the document in question. Mr. B testified that the document was presented by Insured as a paper to sign to get an I.D. to go inside the airport. He stated that he signed one but was never given an I.D. He said he did not work on the airport project, but had worked for Mr. S on a previous project also worked by appellant. Mr. S testified that on that prior project, appellant told him that he had hired Mr. B to work with him on the project; however, appellant testified that he had never hired his own employees, but simply referred other persons directly to Insured for work. The parties and Mr. B agreed that a second paper-signing occurred because the first document was misplaced.

Insured's application for insurance, offered as one of respondent's exhibits, contains an "N/A" entry in response to a query about names of partners and percentage of ownership, although "no" is checked as the response for whether coverage is to be provided to partners. The application for coverage, however, at VIII 2, does require the applicant to pay premium on subcontracted work unless presented with a certificate of workers' compensation insurance. Although respondent's attorney argued that the policy of insurance did not cover appellant as a partner, the policy is not part of the record. The only explanation for the use of the partnership document was given by Mr. S, who stated that appellant "did not fill the full bill" as a contractor because he did not have his own workers' compensation insurance, and could not present a certificate of insurance, which the contractors "above" him required. Mr. S said that the agreement, drafted by his attorney, offered the only other "legitimate way" to allow appellant to perform work for a fixed price. He stated that such agreements were common in his industry.

Mr. S testified that the number of his employees was currently 9, but fluctuated anywhere from 1 to 20, and had been as high as 60; when asked if these were all employees, he stated that some were but that he dealt with many more subcontractors than employees, and he hired employees when he "needed" to, depending upon the nature of the job. Mr. S testified that being paid by the job meant more money to the worker, and he was willing to pay more money if such persons gave up the benefit package.

No testimony was elicited by either party or the hearing officer from Mr. S as to what, precisely, Insured's agreement with, or supervision of, the appellant consisted of, on the job where the injury occurred; Mr. S merely characterized appellant as a

"subcontractor" or a "limited partner," and said he was paid by the job. Appellant offered uncontroverted testimony that he was driven to and from the project from the entrance of the airport, at the beginning and end of work, by Insured's representatives. Appellant testified that he paid his own income taxes.

Appellant's appeal is a letter that protests that his daughter was not allowed to interpret for him, argues facts (some not in the record) bolstering his contention that he was an employee, and questions some aspects of the documentary evidence presented by the respondent. He states that he was intimidated by the hearing.

I. Applicability of Article 8308-3.05 or 3.06

There are two specific statutes that set forth agreements that persons operating as "contractors" may execute to clarify their understanding of the relationship vis a vis workers' compensation insurance coverage, or to extend coverage to non-employees. These statutes also set forth some general coverage principles which may, or may not, be abrogated by the coverage agreements. Section 3.06 expressly applies only to construction jobs involving: (1) residential construction, or (2) commercial construction projects involving structures not larger than three stories or 20,000 square feet. Article 8308-3.06(a). The broader statute is Article 8308-3.05, which applies to most contractor/subcontractor situations, including building or construction projects not within the scope of Article 8308-3.06.

Each statute contains its own definitions of "independent contractor". See Article 8308-3.05(a)(1) and 3.06(b)(2). These definitions incorporate some, but not all, of the elements in case law which define independent contractors for purposes of common law. Section 3.05 further defines "general contractor" and "subcontractor." For purposes of analyzing the applicable statutes, the statutory definitions control. See Brazos Concrete Products, Inc. v. Bullock, 567 S.W.2d 877 (Tex. Civ. App.-Eastland 1978, no writ).

It is essential to determine which statute applies, because, even if appellant were deemed to be an independent contractor, the Insured could still be deemed the employer for purposes of workers' compensation laws. Article 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.

An analysis of facts which should be developed for the record concerning insured's contracts for the airport project may bring it within the definition of general contractor as that term is used in Article 8308-3.05(a)(2). And it has been held in workers' compensation law that the term "subcontractor" (as used in the statutory predecessor to Article 8308-3.05(h)) includes the term "independent contractor". Houston Fire & Casualty Insurance Co. v. Farm Air Service, Inc., 335 S.W.2d 860 (Tex. Civ. App.- Austin 1959, writ ref'd n.r.e.). Even without consideration of this case, the definition of "subcontractor" set forth in Article 8308-3.05(a)(5) is broad enough to include "independent contractor" as defined in 3.05(a)(1).

II. The Law Governing the Relationship of the Parties

The 1989 Act defines "employee" as each person in the service of another under a contract of hire; an independent contractor is not an employee. Considering the prior law, 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. Continental Insurance Company v. Wolford, 526 S.W.2d 539 (Tex. 1975). The fact that a person may have a special skill, furnish his own tools, was doing only one particular job, and took care of his own social security or taxes, might render that person an "independent contractor" with relation to a facility owner, but would not preclude that same person from being considered as an "employee" of the contractor who contracted with the facility owner. Allstate Insurance Co. v. Scott, 511 S.W.2d 412 (Tex. Civ. App.-El Paso 1974, writ ref'd n.r.e.). By contrast, a person who performs work requiring a special skill, furnishes all his own tools, is working according to a predetermined plan, who can come and go from work at times within his discretion, who is paid by the job, and who is not carried on payroll, social security, or income tax withholding rolls of another, may be an "independent contractor" for purposes of workers' compensation. Anchor Casualty Co. v. Hartsfield, 416 S.W.2d 616 (Tex. 1965).

The evidence in this case does not address whether taping is a "special skill," indicates that some, but not all tools were furnished, is silent on whether work was performed according to a predetermined plan, indicates that appellant may not have been free to come and go, indicates that appellant worked specific hours during the day, contains mixed evidence on the method of payment, and indicates that appellant was not carried on social security or income tax records of Insured. Although the decision states that appellant hired and paid others, his uncontroverted testimony was that he did not employ anyone on the airport job. These are matters that should be further developed on this remand.

The decision of the hearing officer is reversed and remanded for further development of the issues in accordance with this decision.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge