APPEAL NO. 93110

This appeal arises under the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993). On January 7, 1993, a contested case hearing was held to determine whether the claimant, who is the appellant in this case, was an employee of (hereafter bank) or an independent contractor. The claimant contends the hearing officer erred in finding that on _____ the claimant was not an employee of the bank, that he was an independent contractor, and that he did not sustain an injury on that date in the course and scope of his employment while working for the bank. The carrier in its response contends that the evidence establishes that the claimant was an independent contractor. Both parties cite case law in support of their respective positions.

DECISION

Finding no error in the hearing officer's decision and order, we affirm.

Claimant was injured on _____, when the door of a bank vault, which weighed 1,000 to 1,300 pounds, fell on him. The claimant testified that he, his father, and his brother were partners in a business known as (company 1). The vast majority of their work involved moving and leveling houses; however, they also occasionally moved heavy items for the bank. Both claimant and his father testified that they were approached in (City 1) by Mr. W or Mr. S, bank employees, and asked if they would move some furniture and other heavy items, including the vault, which the bank had purchased from the (Company 2) in (City 2). There was no written contract between the bank and claimant's company. It was, as claimant's father stated, a "day job" for which the company charged $50 an hour. The bank did not deduct Social Security or federal income tax from this amount. The claimant said the practice of the company was to divide the hourly rate among the partners ($15 each), and to put the remaining $5 back into the business. Claimant's father said they brought no tools with them to this job; that they had equipment such as motorized dollies, but "nothing like we needed there."

On _____, claimant, his father, and his brother drove to (City 2) and, per Mr. W's instructions, met him at a truck rental company. The bank paid for the rental, then claimant, who had a commercial driver's license, drove the truck to a savings and loan building where the items were located. When they were let into the building, they moved those items which were on lists in the possession of Mr. W and Mr. S. At Mr. W's instruction, they moved the vault last because he wanted it to be unloaded first.

Claimant said he told Mr. W they would need a pallet jack in order to move the vault, and that Mr. W instructed him to rent one at the bank's expense. An individual with (Company 3) showed claimant how to disconnect the alarm on the vault; he also advised claimant to remove the door from the vault before they moved it. No bank personnel were present when the vault was being readied. When the claimant, his brother, and an unnamed bank employee were taking the vault door out of the elevator, a wheel from the

pallet jack got hung, and the door fell and struck claimant in the head. He was taken by ambulance to a hospital and was treated for injuries to his head, back, and shoulder.

Both claimant and his father testified that their company performs most of its jobs on a "turnkey" basis, using their own tools and equipment, for which they charged extra in addition to their hourly rate. Claimant characterized a turnkey job as, "that's when someone asks you to do something, and tells you what they need done, and call me (sic) when you're finished." It was his position that this particular job was different in that Mr. W directed his activities and furnished the necessary tools and equipment.

JKK, the bank's president and chief executive officer, stated his understanding that the bank hired claimant's company for this job because of the need for someone with experience in moving heavy items. He said using bank employees was not an option because, given the weight of the vault and its location, they did not know what it would take to move it. Mr. S, who had been the bank's vice president at the time of claimant's injury, testified that he hired claimant's company to move the vault because the bank had used them in the past to move heavy equipment. He agreed that the entire moving operation was supervised by Mr. W, who determined the day and time of the move as well as the place where the truck was rented. He stated that all he wanted was the vault moved and that he did not care about the means claimant employed. He also said he was not aware of anyone from the bank directly supervising the means by which the vault was moved.

The 1989 Act provides that the term "employee" for purposes of workers' compensation insurance does not include an independent contractor. Article 8308-1.03(18). "Independent contractor" is defined as a person who contracts to perform work or provide a service for the benefit of another and 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 have his 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.

Article 8308-3.05(a).

It is claimant's position on appeal that under the facts of this case he does not meet the four elements contained in this provision, in that the bank furnished the necessary tools

and material, and he was not free to determine hours of labor or method of payment. He also maintains that he was not free to determine the manner in which the work was to be performed, and that right of control rested exclusively with the bank.

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. Texas Employers Insurance Association v. Bewley, 560 S.W.2d 147 (Civ. App.-Houston [1st Dist.] 1977, no writ). Where 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. INA of Texas v. Torres, 808 S.W.2d 291 (Civ. App.-Houston [1st Dist.] 1991, no writ). In many respects, the 1989 Act's definition of independent contractor as cited above incorporates common law factors the courts have looked to in analyzing one party's right to control the details of another's work. These have included 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 unit of time or by the job. *See* INA of Texas v. Torres, 802 S.W.2d 291 (Civ. App.-Houston [1st Dist.] 1991, no writ) and cases cited therein. Other factors have included whether the work in question required special skill, whether the worker could come and go, and whether income tax was withheld from him. *See* Texas Workers' Compensation Commission Appeal No. 91005, decided August 14, 1991, citing Anchor Casualty Co. v. Hartsfield, 390 S.W.2d 469 (Tex. 1965). Contrary to the claimant's assertion in his appeal, it does not appear that each and every evidentiary factor contained in Article 8308-3.05(a) must be present for a worker to be an independent contractor; rather, the statute provides that these indicia of control ordinarily are present. As Texas case law has held, each controversy involving whether an injured worker is an employee or an independent contractor must be decided on its particular facts, and ordinarily no one feature of the relationship between the worker and the employer is determinative. Keith v. Blanscett, 450 S.W.2d 124 (Tex. Civ. App.-El Paso 1969, no writ).

Applying the law to the facts of this case, it does not appear the hearing officer erred in determining that claimant was an independent contractor and not an employee of the bank. Clearly, the claimant and his company possessed specialized skills--the ability to move heavy items--which the bank needed because it did not otherwise possess them. Claimant just as clearly utilized and relied on these skills and expertise in performing the task in question, and the fact that bank personnel such as Mr. W provided certain instructions (such as loading the vault last) does not equate to the bank's exercising controls over the details and methods of claimant's work. Exercising general control over an independent contractor by seeing that work is properly and expeditiously done and that proper results are accomplished does not result in making him a servant. Bewley, *supra*, at 150. "When the authorities speak of control over the details of the work, as distinguished from the end result, they mean the physical conduct of the workman in

performing his work, such as when and where to begin and stop work, the regularity of hours and the amount of time spent on particular aspects of the work, the physical method or manner of accomplishing an end result, and control of the type of tools and appliances used to perform the work." United States Fidelity & Guaranty Co. v. Goodson, 568 S.W.2d 443 (Civ. App.-Texarkana 1978, writ ref'd n.r.e.) (citations omitted). That case also found evidence of, but not dispositive of, an employer-employee relationship the fact that the putative employer loaned the workman tools and equipment for use on a job.

Upon review of the record, we find no error in the decision and order of the hearing officer. We accordingly affirm.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge