Affirmed and Majority and Dissenting Opinions filed March 8, 2001.

In The

Fourteenth Court of Appeals

NO. 14-98-01096-CV

PAMELA H. DOZIER, Appellant

V.

TEXAS EMPLOYMENT COMMISSION AND KLH MEDICAL, INC., Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 654,199

M A J O R I T Y   O P I N I O N

The Texas Workforce Commission[1] reconsidered Pamela H. Dozier's eligibility for unemployment benefits, and found KLH Medical, Inc. ("KLH") had not employed her during a necessary period. After exhausting administrative procedures, Dozier pursued a "*de novo* substantial evidence" appeal to Harris County Civil Court at Law Number Three. The judge found there was "substantial evidence" at the time of the agency hearing to support the

---

[1] The Texas Workforce Commission, or "TWC," was known as the Texas Employment Commission when it ruled upon this case. For simplicity, we will refer to it as the TWC throughout.

TWC's conclusion that Dozier was not KLH's employee. We affirm.

I. Factual Summary

A. The disputed contract

The writings Dozier and KLH signed are not ambiguous. If there was no testimony, the disputed contract would clearly be an employment contract. Unlike the disputed contract, a second contract for an undisputed period states Dozier would be an "independent sales person." Under the disputed contract, KLH paid Dozier a draw against sales commissions. Dozier received her commission for (1) "making the transition," (2) for increasing sales to All-Health accounts that were already KLH customers, and (3) for new accounts she brought independently of normal KLH marketing. However, in addition to the duties for which she was paid, the contract also required Dozier to provide "concepts, ideas, and strategy, and to help do the work necessary" to accomplish KLH's marketing plans or goals. The contract further required her to help answer the phone and receive customer orders. Thus, if sales were attributable to her personal activities that were independent of KLH's primary marketing program, she received commissions. The company was to provide "an adequate environment" to perform her responsibilities. KLH would also provide the "marketing tools necessary to make the transition of All-Health [her defunct medical supply company's] accounts to KLH accounts." The disputed contract provides no payment for her work required on KLH's primary marketing activities.

The parties were to review the contract after the period from November 1, 1993 to January 31, 1994. The document named three possibilities for this review, other than terminating the relationship. The parties could:

1) Continue the existing contract;

2) Hire Pam Dozier as a full time employee; or,

3) Enter an independent salesperson contract.

The option to "*enter*" an "independent sales person contract" instead of "continue this existing contract" suggests "this existing contract" was not an "independent sales person contract." The written contract, however, was not the only evidence before the TWC.

B. Evidence before the county court supporting the TWC's decision

Upon appeal to the county court, there was no objection to admission of the transcript of the TWC's evidentiary level hearings. The hearing before the TWC on whether to delete money charged to KLH occurred in two stages, but was all in the same transcript. When it became apparent in KLH's appeal that Dozier's benefits should also be at issue, the TWC continued the hearing to provide Dozier the required notice.

1. The first hearing found in the TWC transcript[2]

The hearing officer noted the TWC could not apply the evidence from the first hearing date to Dozier. Nevertheless, this evidence was relevant to a judicial evaluation of what evidence existed at the time of the second hearing.

At the first hearing, the company president ("Mr. Herbert King") testified Dozier was not an employee during the term of the first contract. He explained that Dozier was using the transition of customers to KLH to liquidate the inventory KLH had purchased from her partner in All Health, her defunct medical supply company. He testified KLH never gave Dozier any instructions because she was supposed to be the expert. He testified the second contract was a renewal of the first. He further testified that if he sent the TWC any wage reports, it was a mistake[3].

---

[2] Pam Dozier testified before the county court at law, but her testimony added nothing that would indicate a lack of substantial evidence in existence at the time of the TWC hearing.

[3] During the May 24, 1995 session, the hearing officer noted that he had KLH's employee lists submitted for the two relevant quarters KLH mistakenly submitted wage reports for Dozier. Her name was not on the lists.

2. The second hearing

Proceedings resumed on May 24, 1995, after official advance notice to Dozier that the TWC was going to reconsider her eligibility for employment benefits. At issue were whether payments to Dozier from KLH should be included as wages in Dozier's base period, and whether the TWC would charge KLH as a result.

a. Dozier's testimony

Dozier testified first. She said her job title was Marketing Consultant. While her contract indicated hiring her as a full-time employee was an "option" when the contract came up for review, she said she worked eight to five, five days a week at KLH during the whole contract. Dozier explained that KLH did not tell her to work eight to five, Monday through Friday, but that it was necessary to accomplish her duties under the contract. KLH subtracted none of the typical employee deductions from her pay. Dozier testified KLH provided a written and oral review of her performance (which she contended supported her claim to be an employee) near the time the contract was to be reviewed. She admitted she could have done some of her work at home.

b. Henry King's testimony

The vice-president of KLH, Henry King, was Herbert King's son. Henry King represented KLH at the second hearing. He testified Dozier had chosen her title as Marketing Consultant. He said she requested her draw be paid bi-monthly. Although KLH provided facilities for her, he said, Dozier was free to work anywhere she wanted to. He said if Dozier had wanted to work at home, KLH would have taken her calls for her. Further, he asserted, the company did not *require* Dozier to enter invoices in the computer system. In fact, he claimed, KLH never gave her a security code clearance to enter invoices. It is undisputed Dozier entered some invoices.

Henry King testified Dozier made the decision whether to market to potential clients

by mail or by personal visits. He designed KLH's own fliers, and Dozier's fliers promoting KLH never crossed his desk. He explained that, although the Kings suggested she answer telephones, Dozier would not have gotten into trouble if she had not. The other independent sales people answered phones when they were in the office.

Henry King testified Dozier did not receive benefits. In contrast, an employee who worked with her, Sandy Harper, had a contract of employment, health insurance, and other benefits. He said the company gave Dozier direction by establishing sales goals. Harper had to be at work from eight to five, and received directions daily. The first contract period was, he said, a trial period to "see if this project was going to work."

c. Patricia King-Ritter's testimony

Henry King's sister, Patricia King-Ritter, worked more closely with Dozier. King-Ritter testified that when Dozier initially approached her, King-Ritter told Dozier that KLH could not hire her. In the beginning, said King-Ritter, Pam proposed to work like Bob Granger, one of KLH's independent salespeople.

While Dozier worked for KLH, explained King-Ritter, Dozier designed her own veterinary fliers, actually directing King-Ritter in putting the flier on the computer. Besides her independent sales activities Dozier worked without supervision on a project sourcing materials for a bid by KLH to a hospital in Japan. King-Ritter testified Dozier did not train employees as Dozier had claimed. Dozier set the advertised prices "unless it was super low," partly to keep KLH price structure similar to All Health's price structure to convert them to KLH customers.

King-Ritter testified Dozier's duties were those written on the contract, while most of the employees at KLH do not receive contracts that looked like Dozier's. She testified the reason Dozier answered phones was that it was hard for others to know when one of Dozier's accounts was the caller. King-Ritter testified she did not supervise Dozier, but answered

Dozier's questions.

KLH gave its employees a very detailed performance review. In contrast, it gave Dozier a more general review. King-Ritter testified it was to inform Dozier where she stood by providing Dozier's sales numbers, and offering helpful opinions and suggestions.

King-Ritter testified KLH entered the second contract to provide Dozier the means to repay unearned draws in her spare time. Dozier was going to work for a competitor, Medco. KLH terminated Dozier's second contract when Medco undercut KLH's prices with merchandise Medco had purchased from KLH through Dozier.

III. Standard of Review

A. Court of Appeals' review of county court

We must look at the evidence presented to the county court, and not the agency record alone, to determine whether the court abused its discretion. *Nuernberg v. Texas Employment Comm'n*, 858 S.W.2d 364, 365 (Tex. 1993). Interpreting statutes and substantial evidence review are issues of law. Failure to analyze or apply the law correctly is an abuse of discretion. *See Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992).

B. The county court's appellate review of the TWC proceeding

Judicial review of sufficiency of the evidence to support a TWC ruling is a *de novo* substantial evidence review. *Id.* Even if the reviewing court would reach a different conclusion, only unreasonable, arbitrary or capricious agency decisions may be set aside.[4]

---

[4] Whether Dozier's point is evidentiary or an issue of statutory construction matters little because the *de novo* substantial evidence review is simply the evidentiary test for the general "arbitrary, capricious, or unreasonable" abuse of discretion standard. *Gerst v. Nixon*, 411 S.W.2d 350, 354 (Tex. 1966). This test avoids determining what evidence was actually before the agency because courts are more concerned with whether the legal effect of the hearing is correct than the wisdom of the informal methods employed. *Texas Railroad Comm'n v. Magnolia Pet. Co.*, 130 Tex. 484, 109 S.W.2d 967, 970 (Tex. Comm'n App. 1937) (opinion adopted). More than a scintilla of evidence exists where the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995). Thus,

Mercer v. Ross, 701 S.W.2d 830, 831 (Tex. 1986).

Substantial evidence review resembles legal sufficiency review. "Substantial evidence" is more than a scintilla. *Olivarez v. Aluminum Corp. of Am.*, 693 S.W.2d 931, 932 (Tex. 1985). In fact, even if other evidence greatly preponderates *against* the agency's decision, there can be substantial evidence. *Lewis v. Metropolitan Savings and Loan Ass'n*, 550 S.W.2d 11, 13 (Tex. 1977); *Browning-Ferris, Inc. v. Texas Department of Health*, 625 S.W.2d 764, 768 (Tex. App.—Austin 1981, writ ref'd n.r.e.). The reviewing tribunal may not decide factual issues. *See Texas State Bd. of Dental Examiners v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988). Review for substantial evidence is purely a matter of law. *Bank of North Am. v. State Banking Board*, 492 S.W.2d 458, 459 (Tex. 1973).

In contrast to legal sufficiency analysis, however, *de novo* substantial evidence review starts with a presumption evidence existed to support the agency decision. Further, instead of reviewing the evidence the agency actually considered, the *de novo* appellant must prove "substantial" supporting evidence *did not exist* when the agency held its hearing . *See* TEX. LAB. CODE § 212.202(a); *Mercer*, 701 S.W.2d at 831.

IV. Analysis

None of the parties agree regarding the correct application of section 201.042 of the

---

instead of deciding issues of fact, the reviewing court determines whether enough evidence existed to enable someone of reasonable mind to reach the conclusion the agency reached. *Dotson v. Texas State Bd. of Medical Examiners,* 612 S.W.2d 921, 922 (Tex. 1981).

Deciding a case on conflicting evidence is not intrinsically an abuse of discretion. *Griffin Indus., Inc. v. Thirteenth Court of Appeals*, 934 S.W.2d 349, 355 (Tex. 1996). Factual determinations so clearly against the great weight and preponderance of the evidence that they are "*clearly wrong and unjust*," however, can be a contributing *factor* in assessing non-evidentiary abuses of discretion. *E.g. Trimble v. Texas Dep't of Protective & Regulatory Serv.*, 981 S.W.2d 211, 214 (Tex. App.—Houston [14th Dist.] 1998, no pet.). "[I]nstances may arise in which the agency's action is supported by substantial evidence, but is arbitrary and capricious nonetheless." *Texas Health Facilities Comm'n v. Charter Medical - Dallas, Inc.,* 665 S.W.2d 446, 454 (Tex. 1984). Examples listed in *Charter Medical*, included a denial of due process prejudicing substantial rights of a litigant; an agency relying solely upon facts of another case; or basing a decision on non-statutory criteria. *Id.* Applying the wrong statute would also be an abuse of discretion.

Texas Labor Code. The appellate attack is framed as evidentiary, but the parties' dispute on appeal primarily concerns what statute applies and what evidence is relevant.

Dozier's ultimate contention on appeal, as at trial, is that there was not substantial evidence her services in the disputed period failed to qualify as employment under section 201.042 of the Texas Labor Code as a salesperson. Section 201.042 provides in relevant part:

> **§ 201.042. Service of Driver or Salesman**
>
> In this subtitle, "employment" includes service:
>
> (2) of a traveling or city salesman . . . who, on a full time basis, . . . obtains . . . orders from a wholesaler, retailer, contractor . . . for resale or supplies for use in the business's operation if:
>
> (A) the employment contract provides that the individual personally performs substantially all of the service;
>
> (B) the individual does not have a substantial investment in a facility used in the performance of the service, except a facility for transportation; and
>
> (C) the service is part of a continuing relationship with the principal and is not a single transaction.

TEX. LAB. CODE ANN. § 201.042 (Vernon 1996). On appeal, she mistakenly contends the presumption of employment in 201.041 applies to her, and argues that section 201.042 adds criteria that must be negated to overcome that presumption. Nevertheless, if there was not substantial evidence to support the factual determinations necessary for denial under 201.042, then her contention substantial evidence did not support the agency's decision would be correct.

KLH makes the same mistaken argument that the general definition of employment in section 201.041 applies. KLH claims, in contrast, that 201.042 only provides "guidelines" for the disposition under the legal requirements of section 201.041.

The TWC correctly explains that 201.042(2) adds categories of salespersons' services

to the scope of the term “employment.” To overcome the courts’ procedural presumption that substantial evidence supported the agency decision, Dozier had to negate that procedural presumption under at least one of the statutes, either 201.041 or 201.042(2).

As the Appellant points out, section 201.041 begins with a presumption of employment. The employers’ testimony Dozier was free of direction and control is substantial evidence her services did not qualify as employment under section 201.041. Upon judicial review, presuming substantial evidence and indulging all inferences in favor of the agency’s discretion, it takes very little evidence to overcome the presumption.

The difficult burden upon judicial review under 201.041 is even more difficult under 201.042. Instead of starting with a presumption that substantial evidence must overcome, Section 201.042 starts without a presumption. Instead, it sets up three evidentiary hurdles for inclusion as “employment.” The agency has the discretion to attach little or no weight to any particular piece of evidence. Short of stipulated evidence or stipulated facts satisfying the criteria as a matter of law, it would be difficult or impossible to overturn an agency decision under 201.042 for lack of substantial evidence.

Indeed, KLH and Dozier agreed before the TWC that they had signed the written contract. The parties’ written memorialization of their contract does not expressly state that Dozier personally had to perform the duties in the contract. Testimony by Harold King, Henry King, and Patricia King-Ritter provided substantial evidence before the TWC that the contract would have allowed Pam Dozier to hire someone to perform her obligations under the contract. The hearings officer was free to weigh the writing as he wished, perhaps even finding the parties had disregarded much of it and worked out a different arrangement. The TWC’s determination of what the parties’ contract provided was factual, not legal[5]. The

[5] Determining whether Dozier met the statutory conditions did not require the legal precision a court would apply to a breach of contract dispute. The TWC’s function was not to split legal hairs or to cut through a tangle of interactions with the razor of contract law. The statutory scheme was designed to determine facts of the relationship, not to resolve contract disputes.

agency's administrative interest was in applying the unemployment compensation scheme to the facts of the agreement to determine whether Dozier was, or was not, employed for the several months in dispute.

As the Texas Supreme court explained in *Charter Medical*, the substantial evidence review seeks indications the agency decision was unreasonable. If there was not conclusive, uncontroverted evidence Dozier met all three criteria of 201.042(2), the agency decision was not an unreasonable application of the wrong statute. The legislature intentionally gave the agency broad discretion in assessing the information presented to it, and we have no discretion to intrude upon that factual determination.

We agree with the TWC that testimony from KLH supported the TWC's finding her services were not employment for purposes of unemployment compensation. Accordingly, we overrule the appellant's contentions. The judgment of the trial court is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Majority and Dissenting Opinions filed March 8, 2001.

Panel consists of Justices Sears, Lee, and Andell.* (J. Andell dissenting).

Publish — TEX. R. APP. P. 47.3(b).

The administrative process would not be suited to exacting contract analysis. Without rules of evidence, any attempt at exacting analysis would add complexity without enhancing accuracy. The TWC's sole evidentiary objective was to make an efficient, expeditious factual assessment of the parties' relationship for purposes of the unemployment compensation scheme. In Appellant's case, the agency had to assess a three to four month period.

* Senior Justices Ross A. Sears, Norman Lee, and Eric Andell sitting by assignment.