APPEAL NO. 92035

On September 26, 1991, a contested case hearing was held at (city), Texas, (hearing officer) presiding as hearing officer. He determined the respondent was an employee of (employer), who carried workers' compensation coverage with appellant, when injured and was entitled to benefits under The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN, arts 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). Appellant urges error in the hearing officer's conclusion that respondent was an employee of (employer) at the time of injury.

DECISION

Finding sufficient evidence to support the findings, conclusions and decision of the hearing officer, we affirm.

The single issue in this case is whether the respondent was an employee of the appellant's insured, (employer), on (date of injury), when he suffered an on-the-job injury. The factual setting surrounding this case is not complicated, albeit, not as fully developed as would be desired.

Succinctly, the respondent testified that on March 18, 1991, he applied for a job with (employer) on their application form. This form was admitted into evidence and shows he applied for a job as a "swamper" (an individual who helps load and unload oil field and oil rig equipment). He was referred for a physical and provided a urine sample for a drug test. All the documents and arrangements were done by a person named "(Mr. B)" who did the personnel work for (employer). On March 19, and after passing his physical, he signed an "Employment Agreement" (Carrier Ex. 1) which provides:

This agreement is made between (Contractors), Inc. doing business as ("Employer") and (Ms. C), ("Employee").

I. Duties of Employment

1.1 Employee is hereby employed as a Swamper and is assigned to (employer) ("Company"). Employee agrees to perform such other duties as shall be determined from time to time by Employer, such additional duties to be promptly communicated to the Employee by and through an on-site supervisor employed by Employer.

1.2 The duties of Employee may be changed from time to time by the mutual consent of Employer and Employee. Notwithstanding any such changes, the employment of Employee shall be construed as continuing under this agreement."

The agreement goes on to provide that Workers' Compensation Insurance coverage will be provided by the Employer and (Company) for the benefit of the employee. The agreement was signed by the respondent on March 19, 1991, but there is no signature on the agreement by the employer. The respondent did not have a copy of the employment agreement and did not know if in fact anyone signed for (employer)

The respondent testified he started work on the (date) and that it was a (Mr. M) who told him he was hired to be a swamper for (employer). The respondent does not know the relationship of Mr. M to (employer) but indicated (employer) and Mr. M operate out of the same building and office. The respondent worked on (date) and (date of injury), on an oil rig site with other (employer) employees. On (date of injury), he was injured in a fall for which he required medical treatment and was unable to work for a period of time.

The respondent testified on cross-examination that Mr. M runs a business called (employer); that Mr. M, who was a "truck pusher" and the guy telling him what to do, supervised the respondent on (date) and (date of injury); that he was subsequently paid for the two days by a check with (Mr. M) Contracting on it; and that he had some doubt about whether he worked for (employer) or (Mr. M) Contracting.

The respondent reiterated that he applied for employment with (employer), thought he was hired by and was an employee of (employer) and that "I was told I was hired by (employer) and if anything happened to me within seven days, if I was off for seven days, they would file a claim with workers' compensation." He stated he was told, and that it was also his understanding, he was covered by workers' compensation.

The appellant presented no evidence other than the employment agreement which was not signed by any employer representative and a cancelled check drawn by "(employer)" paying the respondent for two days work.

Appellant urges that the respondent was not, at the time of his injury, an employee of (employer) for workers' compensation purposes because he was under the direction and control of Mr. M as the operator of a separate business, (employer). Appellant points out that wages were subsequently paid to respondent by (employer) and that the respondent was taken to a doctor who was the company doctor of (employer). Citing Texas Workers' Compensation Commission Appeal No. 91005 (Docket No. AV-00003-91-CC-4) decided August 14, 1991, appellant posits that since Mr. M maintained the right to control the manner of respondent's job performance and paid wages for the two days employment, the hearing officer erred in determining the claimant sustained his injury while working in the course and scope of his employment for (employer).

Needless to say, the shortfall of the evidence in adequately explaining the relationships involved between the players in this case makes a determination just that much

more difficult. However, that does not mean the respondent can not meet or has not met his burden of proof by a preponderance of the evidence. While the employee generally has the burden of proof of the existence of an employer-employee relationship, Bewley v. Texas Employers' Insurance Association, 560 S.W.2d 177 (Tex. Civ. App.-Houston 1977, no writ), the issue is whether that burden has been met. Here, the hearing officer, although presented with no evidence concerning the business operations or relationship of (employer) and (employer), found sufficient evidence to determine the respondent was an employee of (employer) when injured. We believe there was sufficient evidence to sustain this determination:

(1)The respondent applied for a swamper's position with (employer) on March 18, 1991.

(2)There is no indication in the evidence that the respondent ever applied to or was even aware of any job positions or employment opportunities with a concern known as (employer), if any did indeed exist.

(3)The respondent only dealt with an individual by the name of "Mr. B" who handled personnel matters for (employer) concerning his employment processing.

(4)The respondent filled out an authorization for inquiry into past employment as a part of his processing with (employer).

(5)(employer) arranged for the respondent to undergo a physical examination which he successfully passed.

(6)Respondent complied with a drug screen test pursuant to processing with (employer).

(7)On March 19, 1991, at (employer), respondent entered into and signed an employment agreement with (employer) but was not given a copy of it. This provided *inter alia* that (employer) covered the respondent for workers' compensation. (It is not of overriding consequence that the agreement had not been signed by both respondent and (employer), *See* Augusta Development Co. v. Fish Oil Well Servicing Co., Inc., 761 S.W.2d 538, 544 (Tex. App.-Corpus Christi, 1988 no writ.) where the court states that in order to constitute a "contract in writing," the writing does not necessarily have to be signed by both parties, so long as the party not signing accepts the contract by acts, conduct or acquiescence.

(8)On March 19, 1991, the respondent was told by Mr. M that he had been hired (and understood that to be hired by (employer)).

(9)Mr. M operates out of the same office as (employer) (whether he is an employee, agent, or has some other relationship with (employer) is not disclosed in the evidence).

(10)On (date) and (date of injury), the respondent went to an (employer) oil rig work site with other (employer) employees and performed work as a swamper for (employer), to his understanding.

(11)Mr. M was at the same site as a "truck pusher" and "was the guy telling [respondent] what to do."

(12)Subsequently, and after the respondent's injury on (date of injury), he was paid for two days by a check showing "(employer)."

(13)Although not clear from the record just when he became aware of the matter, respondent was cognizant that there was a concern called (employer).

As stated above, this was sufficient evidence to establish on a preponderance standard that the respondent was an employee of (employer) at the time of his injury. The appellant elected not to rebut this or to otherwise present any evidence to show that the respondent was not (employer's) employee at the time of injury. Although a claimant generally has the burden of proof to establish the employer/employee relationship [United States Fidelity & Guaranty Co. v. Goodson, 568 S.W.2d 443 (Tex. Civ. App.-Texarkana 1978 writ ref'd n.r.e.)], where, and under the circumstances present here, there is a written employment agreement, that relationship is sufficiently established. *See generally* Guzman v. Aetna Casualty and Surety Co., 564 S.W. 2d 116 (Tex. Civ. App.-Beaumont 1978 no writ). We note that provisions in the employment agreement are totally consistent with the right of control remaining in (employer) and that the agreement specifically states that notwithstanding any changes in duties, "the employment of Employee shall be construed as continuing under this agreement." Also, the appellant did not present any evidence to clarify the working relationship between (employer) and (employer) or to discount that at the time of his injury, the respondent was not functioning as an employee of (employer).

The record is also devoid of any evidence to conclude that the respondent was somehow an independent contractor or a borrowed servant at the time he was injured. In Dodd v. Twin City Fire Insurance Co., 545 S.W. 2d 766 (Tex 1977), the Supreme Court of Texas stated that the burden of proof was on the insurance carrier to prove that an employee

had ceased to be an employee of the first employer and was a borrowed servant of a second employer. We find this case particularly persuasive to the case *sub judice* since the appellant has not brought forth evidence to establish that respondent's employment relationship with (employer) ceased. In Goodson, *supra*, the court stated that an employee can become the servant of a second employer only if there exists the same elements in relation to the second employer as would constitute him a servant of that person were he not originally the servant of the first and further, even though an employee of one may be subject to the direction of a temporary employer, no new relationship of employment is created if, in following the directions of the temporary employer, he is doing so merely in obedience of, and in the general performance of his duties to, his original employer. This appears consistent with the written employment agreement. *See also*, Cuellar v. Liberty Mutual Insurance Co., 420 S.W.2d 199 (Tex. Civ. App.-El Paso 1967, writ ref'd n.r.e.). That a general employer has allowed a division of control over an employee with a special employer does not, *ipso facto*, mean that he has surrendered control so as to make the employee a borrowed servant of the special employer. Central Surety & Insurance Corp. v. Smith, 410 S.W.2d 14 (Tex. Civ. App.-Tyler 1966, no writ). There is nothing to indicate any change in employment conditions was discussed by or with the respondent, or for that matter, between (employer) and (employer). Also, there was no evidence of any particular agreement, written or otherwise, between (employer) and (employer). It would be a real sleight of hand situation if an employer could perform all the hiring procedures, lead an individual to believe he was hired as an employee, put him to work at a site where he (the employee) and others of his co-employees were working, indicate he was covered by workers' compensation, and, then without indicating in any way that such employee was loaned to some other employer and not disclosing or otherwise making known any arrangements with another employer, disclaim any employee relationship when an injury occurs. This is not the holding of Appeal No. 91005 *supra* nor is it the intent of the Texas Workers' Compensation Act.

The evidence is sufficient to support the findings and conclusions of the hearing officer. The decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge