APPEAL NO. 92053

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On January 14, 1992, a contested case hearing was held in (city), Texas with (hearing officer) presiding. Based on a contract she found claimant, respondent herein, was injured in the course and scope of employment as an employee with either (hiring employer) or (hidden employer) and ordered (appellant) to pay benefits. Appellant asserts that there is insufficient evidence to show that respondent was an employee of hidden employer which it insured, that the contract between hiring employer and (working employer) did not address "right to control" so did not determine the employer of respondent, and that the facts show "right to control" existed in working employer.

DECISION

Since we believe the contract between hiring employer and working employer does not control who has the "right to control" respondent, we reverse and render.

Respondent testified he applied to hiring employer for a job at that employer's office and after drug screening, he was hired by a man named (RM). A man named (LH) also worked for hiring employer. Respondent was told, by a telephone call, that he was hired and to report directly to working employer. He was always under the direction of one of two supervisors, (BB) and (MS), both employees of working employer. To his knowledge, he never had anything to do with hidden employer and was never supervised by hiring employer or hidden employer. He was given his tools - a magnet, gloves, hat and glasses - by working employer to use in picking up scrap iron. Either MS or BB told him what to do, when to do it, and how to do it. He tripped on a piece of iron, injuring his knee on (date of injury), approximately two to three weeks after he was hired. He told MS the day of the injury and was sent home. He returned the next day but the knee became swollen and MS told him to go to the hospital. He went. He called hiring employer two days after the injury and reported the injury to that employer also. He had arthroscopic surgery on the knee and has been released to work. He returned to work, but was then laid off. He has passed a physical exam and been accepted by the U. S. Navy.

Respondent acknowledged that hiring employer told him to report to BB, who would tell him what to do. He understood that RM could fire him or reassign him to another job.

(CH) works as an adjuster for appellant. Appellant paid benefits to respondent until it learned that he was under the control of working employer. CH said there was a contract between hiring employer and hidden employer to the effect that hiring employer is an alternate employer on the workers' compensation insurance policy. CH stated that an alternate employer would report employees on hidden employer's payroll but could not offer coverage under that policy to another insured, such as working employer, when hiring employer sent employees it leased from hidden employer to working employer. CH said that employees of hidden employer leased to hiring employer would be covered by the alternate employer indorsement. CH also said that RM represented himself to her as an employee of hiring employer.

(LH) testified he is a consultant hired by hiring employer to monitor its work. He stated that RM worked for hidden employer and at the time RM hired respondent, RM worked for hidden employer. (RM was leased from hidden employer to hiring employer.) He further testified that respondent never was an employee of hiring employer. He has seen RM hire people but does not recall ever hearing RM identify to applicants that they

work for hidden employer. In his opinion, RM had no control over respondent's duties at working employer. LH further testified that hidden employer knew that hiring employer sent personnel it got from hidden employer to other places to work, such as working employer. LH testified as follows in answer to questions from counsel for the insurance carrier of hiring employer:

Q. All right. With respect to the contract between (hiring employer and working employer) . . . it basically states all employees furnished to (working employer) will be the sole employee of (hiring employer). All right. You agree that that's part of the contract?

A. Yes.

Q. But were they, in fact, employees of (hiring employer) in practical terms?

A. No.

Q. Did (hiring employer) ever have control over those employees?

A. No.

Q. So, even though the contract said they would be (hiring employer's employees, they were not, in fact, (hiring employer's) employees.

A. Correct.

(JH) testified as an employee of hidden employer, a leasing company. He did not know that personnel leased from him by hiring employer were being leased out by hiring employer.

(RB) testified as the owner of hiring employer. He said that hidden employer was aware that hiring employer was leasing its personnel to others. He met with an agent for appellant (the insurance carrier of hidden employer) and told him what his company was doing. That agent, who held himself out as an agent for appellant, was also the president of hidden employer.

Of appellant's three points on appeal, we will consider its Point No. 2 first - did the contract between hiring employer and working employer sufficiently address "right to control" so as to determine respondent's employer at the time of injury? The contract was dated February 20, 1986, so at the time of injury, it was five years old. The operative sentence in that contract for this question is:

> All employees furnished to (working employer) will be the sole employees of (hiring employer), and any orders or directives given to the employees will be considered as given to and by (hiring employer).

In Sanchez v. Leggett, 489 S.W.2d 383 (Tex. App.-Corpus Christi 1972, writ ref'd n.r.e.), two oil field contractors agreed to loan their employees to each other when either was in need. All matters as to pay, taxes, etc., remained with the primary employer of the employee. That court said in holding that the borrowing contractor was responsible for injury to a borrowed employee based on the facts of the case:

Although it is undisputed that the two employees had a contract that determined the employment status as between themselves and their employees, the contract did not contain the "magic" provision that determined the question of "right to control" the borrowed employee.

This court certainly did not conclude that there was no real distinction between designating personnel as the employees of one employer and designating who had the right to control. Another case that appears to address "right to control" by discussing employment status is Magnolia Petroleum Co. v. Francis, 169 S.W.2d 286 (Tex. Civ. App.-Beaumont 1943, writ ref'd). One responding carrier in the case before us quotes from the Magnolia case as indicating that our subject contract is adequate to govern the right of control issue. The quote fails to reveal significant portions by only stating the following:

That all persons engaged in the performance of said work or service shall be solely the servants or employees of contractor . . .

Magnolia also said prior to that quote:

. . . to do and perform the work and services hereinafter set out as an independent contractor, free of control or supervision of company as to means and method of performing the same;

The contract under review also has a phrase stating that orders given will be considered to be made by the lending company. No cases were found using that same language but Carr v. Carroll Co., 646 S.W.2d 561 (Tex. App.-Dallas 1982, writ ref'd n.r.e.) rejected a requested instruction that said no new employment relationship was established if Carr followed directions of the temporary employer merely because his general employer told him to do so. Citing Hilgenberg v. Elam, 145 Tex. 437, 198 S.W.2d 94 (1946), this court found that directions given by the temporary employer were within the normal scope of the temporary employer's business and looked to see who directed the act in question.

The requirement that "right to control" be expressly provided for in the contract is set forth as recently as Archem Co. v. Austin Industrial, Inc., 804 S.W.2d 268 (Tex. App.-Houston [1st Dist.] 1991, no writ) which cited Sanchez in calling for an express provision as to right to control. *Also see* Texas Workers' Compensation Commission Appeal No. 91005 (Docket No. AU-00003-91-CC-4) decided August 14, 1991; Appeal No. 91014 (Docket No. FW-00008-91-CC-3) decided September 20, 1991; and Appeal No. 91043 (Docket No. WA-00009-91-CC-2) decided December 9, 1991; as to right to control.

Even when express provision of the right to control is set forth in a contract, the facts and circumstances may still be considered in determining "right to control." Highlands Underwriters Ins. Co. v. Martinez, 441 S.W.2d 666 (Tex. App.-Waco 1969, writ ref'd n.r.e.). In this case the contract in question provided that all work "shall meet with the approval of Humble's engineers . . . but that the detailed manner and method of doing same shall be under the control of Contractor, Humble being interested only in the result . . ." When the claimant argued that Highlands did not plead that the written contract was a subterfuge or had been abandoned, this court said that such a pleading was not necessary, citing Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964). Martinez held the contract not to be conclusive saying that there was ". . . unquestionable adequate evidence of the conduct, custom and practice of the parties 16 years after the written contract was made to raise a fact issue . . ." as to borrowed servant.

In applying these cases to the evidence before us, we first looked to the contract between hiring employer and working employer. It did not expressly address "right to control" and the language it used was not sufficient to show right to control. Simply denominating individuals as one's "employees" does not equate to reservation of a right to control the details of their work in all circumstances, most especially under the facts of this case. Even if the contract had expressly addressed "right to control," evidence at hearing that respondent only took orders from working employer, that no other employer in question ever supervised him prior to the accident or furnished any tools to him, that hiring employer appeared to have hired him and directed him to working employer, and that hidden employer paid his wage, would call for examination of "conduct, custom, and practice" whether subterfuge, etc., was pleaded as an issue or not, in addition to analysis of the contract. Martinez and Love. Appellant's Point No. 2, the contract between hiring employer and working employer does not control the issue of borrowed servant, is correct.

On issues requiring a review of factual determinations, this panel looks to see if the decision is against the great weight and preponderance of the evidence. Burnett v. Motyka, 610 S.W.2d 735 (Tex. 1980) and Texas Workers' Compensation Commission Appeal No. 91002 (Docket No. TY-00003-91-CC-01) decided August 7, 1991.

Appellant's Point No. 3 states that actual circumstances as to the exercise of control must be considered to determine the issue of borrowed servant in this case; and it says that such review will show that working supervisor had the right to control, making it the employer.

While the hearing officer in "Discussion" of this case acknowledged that working employer exercised actual control over details of respondent's work, the contract was viewed as controlling. Based on the contract, the hearing officer made Findings of Fact 2 and 3.

2.(Working employer) did not have the right to control the details of Claimant's work.

3.Either (hidden employer or hiring employer) had the right to control the details of Claimant's work.

The evidence of record as to facts and circumstances [*See* Producers' Chemical Company v. McKay, 366 S.W.2d 220 (Tex. 1963)] was provided by respondent and LH, a consultant for hiring employer. LH said that hiring employer had nothing to do with respondent's job at working employer and that, in fact, respondent was never an employee of hiring employer. Looking specifically at the facts of this case under the criteria described in Producers, the nature of the general project at working employer was never discussed at hearing but respondent's testimony that he picked up scrap iron would indicate only peripheral impact on that project; the nature of respondent's work, as he stated, was unskilled - he testified to no training received or skill developed prior to reporting to working employer; the length of the special employment is not known because it was cut short by the injury, but even at two to three weeks duration, it made up 100% of his time associated with either hiring employer or hidden employer; neither hiring or hidden employer furnished any machinery or tools; all acts of actual control were performed by working employer; the only incidence where hiring or hidden employer was said to prevail was that respondent said RM could direct him where to go or could fire him (respondent thought RM worked for hiring employer.) Respondent, apparently on his own, chose to file his notice of injury with working employer because he thought he was their employee. From the evidence of record

we conclude that Finding of Fact 2 and Finding of Fact 3 are both against the great weight and preponderance of the evidence. Conclusion of Law 3, "At the time of his injury, Claimant was not an employee of (working employer)" was based on Findings of Fact 2 and 3 and is also against the great weight and preponderance of the evidence. Since the evidence was overwhelming that working employer did have the right to control respondent and the hearing officer did address this question at hearing, we see no reason to remand in order to find that working employer was respondent's employer at the time of the injury.

The last point we consider (appellant's Point 1) stated that there was insufficient evidence to establish that hidden employer was the employer of respondent on the date of injury. This point becomes moot in light of our determination that working employer was the employer at the time of the injury. We would point out that had we not been able to determine that working employer was the employer, we would have had to remand on this issue. The record did not contain a copy of respondent's application for work and no other documentary evidence to indicate whether hiring or hidden employer was an employer. Even the hearing officer could not differentiate between hiring employer and hidden employer.

We reverse the decision and order of the hearing officer insofar as it names (appellant) and render that (carrier) is ordered to pay as stated in the decision and order.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge