APPEAL NO. 92065

A contested case hearing was held in (city), Texas, on January 10, 1992, (hearing officer), presiding as hearing officer. He determined that the appellant was not the employee of (VC, Inc.), who carried workers' compensation coverage with respondent, and, accordingly, was not 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 argues that several of the hearing officer's findings and conclusions are so against the great weight and preponderance of the evidence as to be manifestly unjust and urges us to reverse and remand the case on the issue of who the employer was on the date of injury and for the resolution of the issues unresolved in the hearing officer's decision and order.

DECISION

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

This case involves the not uncommon, convoluted relationship between various small companies involved in the oil field business. Determining who is the employer at a given time sometimes becomes very dependent on the particular facts and circumstances surrounding a given situation.

In this case, the appellant injured his back on the job on (date of injury). The respondent is the workers' compensation carrier for (VC, Inc.). (MOS, Co.) is owned by (BDJ, JR), and had no workers' compensation coverage on (date of injury). VC, Inc. is in the roustabout, construction and heavy equipment business. MOS, Co. is in the roustabout and construction business on a smaller scale than VC, Inc.

(JL) was a roustabout pusher who was employed by MOS, Co. about January 1990. His immediate supervisor was BDJ, JR, who owned MOS, Co. and who told him to hire a roustabout crew. JL hired the appellant in December of 1990 and was the appellant's supervisor.

The appellant testified that JL hired him, was his supervisor, and he understood he worked for MOS, Co. and BDJ, JR. He stated that for the period of "01/27/91 to 02/02/91" he was paid by a check drawn on VC, Inc. but at other times was paid by checks drawn on MOS, Co. On (date of injury), he was injured when lifting a heavy tool box which was located in a mobile home owned by (BDJ, SR), the father of BDJ, JR. He went to the hospital that night for treatment and was subsequently seen by other doctors. He testified that neither (Mr. V) nor (Mr. WG) ever told him what to do and that on the date of his injury, JL was not at the location at the time but told him to do what BDJ, SR told him to do while he was gone. BDJ, SR told appellant and another crew member to move the tool box. He indicated he had injured himself on (date) in an unrelated incident and during that period his check was drawn on MOS, Co. He stated that JL told him VC, Inc. "was the insurance of the company" that he, the appellant, was working for.

JL testified that BDJ, JR would sometimes send him out to work jobs for VC, Inc. but that he was usually paid on MOS, Co. checks except for two occasions. He stated Mr. WG worked for VC, Inc. and would supervise work that they did for VC, Inc. He also testified that BDJ, JR would tell them how to do the VC, Inc. jobs. Additionally, the "oil company man" would tell them what to do on occasion but that he got direct orders from BDJ, JR. JL further testified he did not know anything about the arrangements between VC, Inc. and MOS, Co. He stated that on (date of injury), his crew used a one-ton tow truck (the evidence indicates this was not a VC, Inc. truck) and that the trucks they used at various times were unmarked and a mixture of VC, Inc. trucks and MOS, Co. trucks. He also related that VC, Inc. and MOS, Co. shared an office and shared employees but that he went to work for MOS, Co. and resigned from MOS, Co. in mid 1991 and the only way he would know he was connected with VC, Inc. was when he got a VC, Inc. paycheck.

Mr. V was called by the respondent and testified that appellant was not his employee and that no one from his company supervised BDJ, JR'S crews. He stated that BDJ, JR had an arrangement with VC, Inc. to lease four trucks to MOS, Co., without crews, and that as a part of the arrangement, because MOS, Co. had a tight cash flow, VC, Inc. would pay the payroll when his trucks were actually being used on a job. When asked about (Ms. RJ) signing and listing VC, Inc. on the Employer's First Report of Injury (Carrier Exhibits D and E, interim TWCC Form 1) as the employer on both the appellant's (date) and 30 injuries, he stated Ms. RJ never worked for him and had no authority to make out an employer's first report of injury for him. He did indicate that his secretary filled out an employer's first report of injury on (date of injury) incident because according to the paperwork the appellant was on his payroll, and if they hadn't gotten something in, the Commission would levy a fine. (None of these reports may be considered as admissions or evidence against the employer or insurance carrier where facts in a report are contradicted. Article 8308-5.05(b)) Although BDJ, JR directed all the crew's work, BDJ, JR wanted an arrangement in the truck leasing verbal agreement for VC, Inc. to pay the payroll when the crews used VC, Inc. trucks because MOS, Co. didn't have a big cash flow. Mr. V claims all he was doing was leasing trucks and that MOS, Co. employees were never his employees although they were on his computer payroll. He stated he had workers' compensation for his employees but didn't know if MOS, Co. had coverage.

Mr. WG testified that he worked for VC, Inc. as a salesman until March 1991. He stated he also supervised the heavy equipment and the people using the heavy equipment (bulldozer, loader, roller, etc.). This is not the work done by roustabout crews and Mr. WG stated he never instructed any BDJ, JR crew members on how to do their work. Although he was in the same area at times as the BDJ, JR crews, he states he didn't even know where they worked or what they did. He specifically denies that he ever instructed JL on how to do anything and states he had no authority to direct any BDJ, JR crew.

Based upon the evidence, the hearing officer determined that appellant had not proven by a preponderance of the evidence that he was an employee of VC, Inc. at the time

of his (date of injury). The hearing officer, accordingly, did not arrive at any findings or conclusions involving the other two issues which were raised; whether the claimant was disabled and continues to be as a result of the accident on (date of injury) and what the correct weekly wage was.

The appellant disagrees with the hearing officer's findings and conclusions:

Finding of Fact 9:

That on the date of the alleged injury, (date of injury), there had been no action to terminate claimant from his employment with MOS or D&D Service, nor to hire him by VC.

Finding of Fact 11:

That V personnel did not provide supervision or control over claimant nor had claimant ever met Mr. V, the owner of VCs.

Conclusion of Law 3:

That claimant has not proven by a preponderance of the evidence that he was an employee of VC at the time of his alleged injury on (date of injury).

Conclusion of Law 4:

That the claimant is not entitled to Texas Workers' Compensation insurance benefits from (Insurance Company) as the insurance carrier for VC, based on the alleged injury of claimant on (date of injury).

The appellant's position that he was an employee of VC, Inc. at the time of his injury is centered on the fact that he was paid during that pay period on a VC, Inc. check and the assertion that he was being supervised or controlled at the time by VC, Inc. While there is evidence that appellant was on the VC, Inc. payroll and was, indeed, paid on a VC, Inc. check, there was also evidence from Mr. V that this was only done because of a cash flow matter and it was the arrangement desired by BDJ, JR in his truck leasing arrangement with VC, Inc. In any event, the matter of the payment of wages is but one factor that should be properly considered in determining the employer/employee relationship. *See* United States Fidelity & Guaranty Co. v. Goodson, 568 S.W.2d 443 (Tex. Civ. App.-Texarkana 1978, writ ref'd n.r.e.). However, the right to control the details of the workers' performance is the ultimate and decisive test. Goodson, *supra; See also* Texas Employers Insurance Co. v. Bewley, 560 S.W.2d 147 (Tex. Civ. App.-Houston 1977, no writ); Halliburton v. Texas Indemnity Insurance Co., 213 S.W.2d 677 (Tex. 1948). Here, the evidence was at best conflicting, and generally more persuasive, that control and supervision of the appellant at

the time of the injury rested with MOS, Co.'s supervisor or personnel. Aside from the testimony of both Mr. V and Mr. WG who denied any supervision or direction of MOS, Co. crews, and the appellant specifically, the appellant himself testified Mr. V and Mr. WG did not tell him what to do on the job. JL who was the appellant's supervisor and was at another location on the day of injury, told the appellant to do what BDJ, SR told him to do while he was gone. When the appellant was injured, he was moving a tool box at the direction of BDJ, SR from BDJ, SR's mobile home to a truck. It also appeared from the evidence that the truck the crew was using on that day did not belong to VC, Inc. and that it might not have been proper to bill that particular work through VC, Inc. according to the arrangement between Mr. V and BDJ, JR. In any event, this evidence, when weighed against conflicting evidence, was sufficient to sustain the hearing officer's determination. Conversely, reviewing the entire record, we find the hearing officer's determination was not so contrary to the overwhelming weight of evidence as to be clearly wrong and unjust. Employers Casualty Co. v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The appellant states that the finding that there was no action to terminate appellant's employment with MOS, Co. or any other BDJ, JR enterprise, or to hire him by VC, Inc., is irrelevant. While there is certainly evidence to support this finding, we do not believe it dispositive of the case since the question of whether the appellant became the "borrowed servant" of VC, Inc. is brought into play by the evidence. As indicated above, the evidence is sufficient to support the finding that VC, Inc. did not provide supervision or control over the appellant and was not the employer at the time in question. As we indicated in our recent decision [Texas Workers' Compensation Commission Appeal No. 92035 (Docket No. BC-00005-91-CC-2) decided March 12, 1992], even if the evidence were construed (which we do not hold) to show some sharing of supervision or control between MOS, Co. as the general employer of appellant and VC, Inc. as a special employer, Goodson, *supra*, teaches that 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. Goodson, *supra*. *See also* Dodd v. Twin City Fire Insurance Co., 545 S.W.2d 766 (Tex. 1977).

Finding the evidence sufficient to support the determination that the appellant was not the employer of VC, Inc. at the time of his injury, the decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Susan M. Kelley
Appeals Judge