APPEAL NO. 92172

On April 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issue before the contested case hearing was the identity of the employer of the respondent/claimant, (claimant), at the time he was injured on the job, and, as a result, which carrier would be liable for payment of compensation.

(Hearing officer) determined that the respondent/claimant sustained a compensable injury on (date of injury), in the course and scope of his employment as a borrowed servant of (Company C), while working at its premises. She found that appellant, Hartford Accident & Indemnity Company, was liable for benefits as carrier for Company C, and that respondent/claimant was not injured in the course and scope of employment with either (employee leasing company) or (Company B). The hearing officer indicates that she has applied Appeals Panel Decision 92053 (Docket No.BU91140558/02-CC-BU31) decided March 27, 1992. That hearing also involved Company B and employee leasing company, and the issues were similar.

The appellant, Hartford Accident & Indemnity Company as carrier for Company C, has raised three main points of error. It argues that the contract between Company B and Company C establishes as a matter of law that respondent/claimant was an employee of either employee leasing company or Company B, contrary to the finding of the hearing officer. Appellant further notes that, this being the case, the respondent/carrier for employee leasing company is liable for benefits because of an alternate employer endorsement to its insurance policy, which names Company B as a covered alternate employer. Appellant finally argues that the Legislature, by amending the definitions of "employer" and "employee" in the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. Art. 1.03 (18) and (19) (Vernon's Supp. 1992), has rendered the "borrowed servant" doctrine developed under prior law inapplicable to the 1989 Act.

Both respondent/carriers ask that the decision of the hearing officer be upheld. Respondent/claimant filed no response.

DECISION

As we believe that the contract between Company B and Company C does not control who had the "right to control" respondent/claimant, and because we are of the further opinion that the "borrowed servant" doctrine has not been abrogated under the 1989 Act, we affirm the hearing officer's decision that claimant was a borrowed servant of (Company C)l at the time of the injury, and its carrier is liable for compensation.

The occurrence of a work-related injury was not disputed. (claimant), the respondent/claimant, lacerated his hand on (date of injury), while working as a laborer on the premises of Company C. He stated that he worked for Company C as a result of being sent there by Company B, who had hired him (through its employee, (RM)), approximately two months earlier. Respondent/claimant was sent to Company C when he was hired. He

was supervised in his day-to-day work by (employee), an employee of Company C. He wore safety equipment furnished by Company C. Respondent/claimant testified that he considered Company C to be his employer. He said that he received his paycheck at Company C. He said that it was printed in the name of the employee leasing company, but recalled that the name of Company C was also on the paychecks. He was instructed by persons at Company B to contact them if he ever had problems at Company C.

When he was injured, he reported the injury to (employee), who sent him to a medical clinic. Respondent/claimant stated that he told Company B a week later about the injury. He said that he returned to Company B "after release," but that they did not send him anywhere else to work and that he had not maintained contact with Company B. Respondent/claimant stated that it was his understanding that Company B could send him someplace other than Company C, even if he had not been injured.

Although not allowed by the hearing officer to have party status, the attorney for employee leasing company recited on the record that his company was willing to accept liability for the claim.

(CH), the adjuster for respondent/carrier for employee leasing company, testified that employee leasing company, under the name of (leasing company)., was insured for workers' compensation insurance by appellant for 1991. She confirmed that Company B was endorsed on this policy as an alternate employer, and that an employee of Company B would be covered by them. CH stated that a predecessor employee leasing company, under the name of (leasing company), had been insured beginning in September 1990, and that an alternate employer endorsement on that policy included not only Company B, but Company C as well. CH stated that it was her understanding that this rider expired sometime in December 1990. CH acknowledged that her company had executed a waiver of subrogation in favor of Company C, for the (leasing company) policy in effect in 1991. It was her understanding this meant that her company would not seek a third party recovery from Company C based upon any payments it made to workers' compensation claimants.

CH stated that it was her understanding that RM, who was identified as an employee of employee leasing company, hired the respondent/claimant. She stated further that she was aware as of January 13, 1991, that (leasing company) and Company B had a staff leasing arrangement. CH testified that, to her knowledge, no alternate employer endorsement in favor of Company C had been requested for 1991. She further stated that her company obtained the insurance account through assignment from the Assigned Risk Pool.

(LH), who identified himself as a consultant for, and former employee of, Company B, stated that it was his job to monitor the job sites of Company's B's clients to make sure that personnel furnished were qualified to do what they were needed to do. He stated that RM, an employee of employee leasing company, was in charge of hiring such workers, and telling them where to report and what they'd do when they got there. He disputed that

Company's C's name would have appeared on respondent/claimant's paycheck. He stated that Company B had nothing to do with paying the salary of respondent/claimant but that he was paid by employee leasing company, which also handled deductions and taxes. LH said that Company B did not control or direct respondent/claimant's activities at Company C, and that Company C undertook actual direction and control. LH investigated the performance of employee leasing company for Company B, and recommended to the company president, (BB), that he transact the August 1990 contract with employee leasing company. His understanding was that employee leasing company, through its carrier, would handle workers' compensation insurance. LH was of the opinion that Company C understood that employee leasing company would be supplying the labor for its contract with Company B. LH stated that, to his knowledge, neither contract was a sham or subterfuge, nor was either abandoned.

(BB) testified about Company B, and stated that the (Company B) businesses were engaged in three major types of activity: one maintained a pipeline yard in (city), Texas, while another division performed small industrial and commercial construction. Company B transacted maintenance services and the labor contracting business. He stated that Company B obtained workers for its client businesses through subcontracting, and that employee leasing company was such a subcontractor. BB said that a contract originally executed with (leasing company) on August 27, 1990, along with its amendments, was assigned to (leasing company) when the company's name changed. BB noted that he had required that the Company B's contract with Company C be expressly incorporated into the (leasing company) contract.

BB testified that RM and a woman at Company B's location were employees of employee leasing company. He stated that employee leasing company had firing authority over personnel RM hired, although he acknowledged that it would fire an employee on Company B's request. BB also stated that while Company C could not fire employees, as a practical matter Company C would be able to send back an employee it didn't want. He stated that the contracts with employee leasing company and Company C had not been abandoned, nor were they intended as a sham or subterfuge. BB stated that it was his understanding that employees sent to Company B's clients were to be "borrowed servants," but that it was also intended that employee leasing company would furnish workers' compensation insurance to cover these employees.

BB stated that no one from Company B ever supervised or directed respondent/claimant in his work. BB stated that he understood that one (FF) was both an officer of employee leasing company and president of Texas State Insurance Agency, through which the workers' compensation policy was obtained. BB assumed that FF was also an insurance agent. BB affirmed that he had received an August 17, 1990, letter from FF, contained in the record, which refers to employee leasing company and Company B as "joint employers". It further describes employee leasing company as the "W-2" employer and Company B as the operations employer. The letter outlines the cost savings that will be realized if employee leasing company purchases the workers' compensation insurance. BB

says that he started doing business with employee leasing company after receiving this letter.

Answers of FF to depositions on written questions state that FF denies authorship of a letter to Company B; however, the letter is not attached as an exhibit to the written answers. The answers are silent on the issue of whether FF was an agent for the insurance carrier of employee leasing company, and are otherwise generally cumulative of other testimony in the record. FF states "yes" in response to "Did you intend for the workers provided under the contract attached as Exhibit B to be (leasing company) employees?" The contract is not attached as an exhibit to the answers , but it can be inferred from answers to other questions that this is the contract with Company B, including amendments.

Essentially, the contracts in this record are the same as those dealt with in Appeals Panel Decision No. 92116 (Docket No. BU-91-138613-02-91-CC-BU41) decided May 14, 1992. The provisions of the contract between Company B (described as "Contractor" therein) and Company C (described as "Company" therein), insofar as reference is made to persons in the position of respondent/claimant, are as follows:

I. Service to be Performed

> The Contractor agrees to furnish personnel, as requested, by the Company, from time to time, to perform services for the Company. Such personnel are sometimes referred to as an "employee" of Contractor. The Company reserves the right to furnish such equipment or additional safety supplies which it deems appropriate for the job. All personnel furnished to Company under the contract will be employees of Contractor or of (leasing company), Inc. subject to the provisions of Section 8 below. Should Company desire to hire any of the personnel provided to Company by Contractor, then such person will be released by Contractor upon Company's written request, as soon as a replacement can be hired by Contractor, if it desires to hire a replacement.

7. Independent Contractor

> The Contractor is and shall be an independent contractor.

Section 8 of the Contract gives permission to Company B to subcontract employees through employee leasing company. This provision notes: ". . . All personnel which are hereafter provided by Contractor to Company under the Contract will be provided by (leasing company) to Contractor, under a separate agreement solely between (leasing company) and Contractor. Such personnel will be employed by (leasing company), such personnel will be employees of (leasing company), and such personnel shall be carried on the payroll and paid by (leasing company). (leasing company) shall pay all of the taxes and benefits of its said employees . . .."

This contract also obligates employee leasing company to provide workers' compensation insurance coverage and an alternate employer endorsement for Company C. We will briefly note here, without a full recitation of provisions contained therein, that the contract between employee leasing company and Company B delegates supervision and control of leased employees to Company B.

While the contract between Company B and Company C contains the further bare provision that Company B is an independent contractor, we find that this provision alone, given the contract as a whole, the facts concerning supervision of respondent/claimant, and the testimony of one of the persons who signed the contract, (BB), is insufficient as a reservation of the right to control employees provided to Company C. The appellant is not correct in its assertion that a simple designation of person as "employees" necessarily constitutes reservation of the right of control, a position which goes against case law.

We disagree with appellant's contention that the Legislature intended to abrogate use of the "borrowed servant" doctrine for injuries sustained on and after January 1, 1991. The Appeals Panel has previously held that the "borrowed servant" doctrine is viable under the 1989 Act. Appeals Panel Decision No. 91005 (Docket No. AV-0003-91CC-4) decided August 14, 1991. The definitions of "employer" and "employee" set forth in Art. 83083-1.03 (18) and (19) are virtually identical to those used in the prior law. *See* Article 8309, Section 1. As indicated by one of the cases appellant cites, it is presumed that a statutory amendment that does not change language interpreted by Texas courts indicates that the Legislature knew and adopted the interpretation placed on such language and intended the new statute to receive the same construction. *See* City of Lubbock v. Knox, 736 S.W.2d 888 (Tex. App.- Amarillo 1987, writ denied).

The applicability of Arts. 8308-3.05 and 3.06 (as well as implementing rules of the Texas Workers' Compensation Commission) to these parties was neither developed in the evidence at the contested case hearing nor argued by any of them. Consequently, the situation must be analyzed in terms of statutes and case law that govern employee and employer status in light of the "borrowed servant" doctrine.

Texas courts recognize that a general employee of one employer may, in certain circumstances, become the borrowed servant of another. Sparger v. Worley Hospital, Inc., 547 S.W.2d 582 (Tex. 1977); Carr v. Carroll, 646 S.W.2d 561 (Tex.App.-Dallas 1982, writ ref'd n.r.e.); U.S. Fire Insurance Co. v. Warden, 471 S.W.2d 425 (Tex. Civ. App.- Eastland 1971, writ ref'd n.r.e.). When both employers are operating under a contract, a court can dispose of the borrowed servant issue without the necessity of considering the facts and circumstances of the project only if that contract clearly and expressly assigns the right to control. Bucyrus-Erie Co. v. Fogle Equipment Corp., 712 S.W.2d 202 (Tex. App.-Houston [14th Dist.] 1986, writ ref'd n.r.e.).

In Sanchez v. Leggett, 489 S.W.2d 383 (Tex. Civ. 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 liable for injury to a borrowed employee:

> 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.

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 the right to control. This case further noted that gratuitous provision of workers' compensation benefits does not itself establish the employee/employer relationship. *See also* Texas Workers' Compensation Commission Appeal No. 91014 (Docket No. FW-00008-91-CC-3) decided September 20, 1991; and Texas Workers' Compensation Commission 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. Civ. App.-Waco 1969, writ ref'd n.r.e.); Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964).

The fact that the parties intended for employee leasing company to carry workers' compensation coverage on employees provided to appellant will not defeat applicability of the "borrowed servant" doctrine to these facts. *See* Marshall v. Toys-R-Us Nytex Inc., 825 S.W.2d 193 (Tex. App.- Houston [14th Dist.] 1992, no writ). Notwithstanding the recitation in the contract that Company B would be an independent contractor, this appears not to have been the case in fact, and arguably would not extend to a claimant actively disavowed by LH and BB as an employee of Company B.

We recognize that the hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. Art. 8308-6.34(e) (Vernon Supp. 1992) (1989 Act). The hearing officer's decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We do not substitute our judgment for that of the hearing officer when the findings are supported by some evidence of probative value, and are not against the great weight and preponderance of the evidence. Texas Employer's Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. Civ. App.-Texarkana 1989, no writ). The decision of the hearing officer will be set

aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or

manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We therefore affirm the decision in this case.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge