APPEAL NO. 92179

A contested case hearing was held on April 7, 1992, in (city), Texas, after two continuances granted to appellant, with (hearing officer) presiding as hearing officer. He determined that (Claimant/respondent) was not the borrowed servant of (Employer 2) when he injured his back on (date of injury), and, accordingly, that appellant, the workers' compensation insurance carrier for (Employer 1), is liable for payment of Claimant/respondent's benefits under the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). In its request for review appellant, in effect, challenges Appeals Panel to reverse and render a decision that Claimant/respondent was the borrowed servant of Employer 2. Neither respondent filed a response.

DECISION

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

(Western), a customer of Employer 1, had 80,000 gallons of an expensive liquid solution used in natural gas processing which it desired to have "reclaimed" or cleansed of certain contaminants for reuse. Employer 1, while not having experience in such chemical reclamation, desired to attempt the reclamation effort on a trial basis so that, if successful, it might obtain similar business. Ms. N, a sales representative for Employer 1, assuming that Employer 2, being in the water distillation business, probably had "a process" which could cleanse the solution, contacted, Employer 2's "technical man," about doing the job. After a representative from (Company), the manufacturer of the solution, discussed the matter with Mr. J and concluded that Employer 2's ionization filtration process could probably do the job, Western agreed to let Employer 1 undertake the effort, provided 16,000 gallons of the solution in a holding tank in (city), Texas, and agreed to pay 80 cents for each gallon reclaimed if it met a stated standard. Employer 1 then engaged Employer 2 sometime in January or February 1991 to perform the reclamation using the latter's equipment consisting of certain tanks containing the filtering media including a resin, connecting hoses, a meter to monitor the filtration process, as well as a truck to transport the filtration tanks back and forth each day from Employer 2's premises in (city) to (city). Employer 1 procured the special resin required and was to pay Employer 2 after being paid by Western. The job involved charging the resin filtration tanks at Employer 2's facility in (city), then taking those tanks to the holding tank site in (city), connecting them so the solution could flow through them, closely monitoring the saturation of the resin on the meter, and then disconnecting the filtration tanks and returning them to Employer 2's premises to be regenerated. That procedure including the round trip drive to (city) took about five hours, and each day a sample of the reclaimed solution was provided to Employer 1 who had it tested to see if it met Westerns' specifications.

Western soon became concerned with the time being taken to cleanse the 16,000 gallons and imposed a deadline on Employer 1. Mr. J, the only employee designated by

Employer 2 to work on the Western job, attended to it sporadically as his other duties permitted. Employer 1 wanted Employer 2 to put more people on the job but Employer 2 couldn't afford to do so. Mr. J suggested that Mr. N get him some help so he could stay in (city) and perform the technical part of the job, namely, regenerating the filtration tanks for reuse, while someone else drove to the holding tank to perform the relatively simple connection, filtration and monitoring procedures. Mr. N felt that a new hire could spend more hours filtering and enable Employer 1 to meet Western's deadline. Mr. N asked Mr. J if he knew of anyone available to do the job. Mr. J was acquainted with Claimant/ respondent who had some plumbing experience and was then unemployed. He discussed the job with Claimant/respondent, took him on a Saturday to the holding tank site to show him what the job involved, and the following Monday took him to meet Mr. N. The latter then obtained approval from his supervisor to hire Claimant/ respondent at $5.00 an hour to work the Western job. He was to perform the filtration procedures at the holding tank while Mr. J performed the resin tank regeneration each day. According to Mr. J, Employer 1 didn't want Claimant/respondent involved in the tank "regeneration process or anything like that." Claimant/respondent was instructed by Mr. N to work whatever hours were required, six or seven days a week, to get the job completed on schedule. He was required to call in the hours he worked each day to Employer 1 and was paid by Employer 1. Employer 1 also paid for any overtime Mr. J worked on the Western job.

Mr. J testified that there was no real "training" involved in acquainting Claimant/respondent with his duties in that all the latter had to do was hook up the tanks and "watch the numbers." Claimant/respondent agreed on cross-examination that Mr. J trained him "if you want to call it that" and testified that the job was "very easy" and that all it involved was "hooking hoses up and turning on a valve." Mr. N stated that there was no written contract between Employers 1 and 2. He understood that Claimant/respondent would be an "independent contractor." As far as he knew, the job didn't require any special training, anyone with Employer 1 could do it, and that Mr. J showed Claimant/respondent what to do. Claimant/respondent said that Mr. J showed him how to do the work but did not "control" him including his hours. Mr. J stated he provided "technical supervision" and that Claimant/respondent could call him if he had a problem at the job site. According to Mr. J, Employer 2 had no "control" over Claimant/respondent or his hours but understood he would arrive at Employer 2's premises daily at 8:00 a.m. The record didn't indicate that Mr. J went to the holding tank with Claimant/respondent after the day he took him there to show him what the job would entail. Mr. N once accompanied Claimant/respondent to the job site. Claimant/respondent was told that Mr. N was his "boss" and if he had a problem on the job, other than running Employer 2's equipment, he would call Mr. N. He understood his employer was Employer 1 and that he had to do whatever they told him to do.

After working a few weeks, Claimant/respondent injured his back at the premises of Employer 1 on (date of injury) when he assisted Mr. J, at the latter's request, in lifting a barrel of resin onto a truck to take it to Employer 2's premises for use in the filtration tanks. There was no dispute as to his injury. Employer 1 ultimately wasn't paid by Western because the solution it reclaimed didn't meet Western's specifications.

Appellant contends that notwithstanding that Claimant/respondent was paid by Employer 1, he was the "borrowed servant" of Employer 2 on (date of injury) because Mr. J selected him, trained him, supervised him, and controlled his daily activities. The Appeals Panel has previously discussed and applied the "borrowed servant" doctrine as applied by the Texas courts. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 91014 (Docket No. FW-00008-91-CC-3) decided September 20, 1991, which determined that the "borrowed servant" doctrine remains a viable legal doctrine in workers' compensation cases under the 1989 Act. In Archem Co. v. Austin Industrial, Inc., 804 S.W.2d 268, 269 (Tex. App.-Houston [1st Dist.] 1991, no writ), the court observed that "[u]nder Texas Workers' Compensation Law, the entity with the `right to control' the employee at the time of the accident is the `employer' for workers compensation purposes. (Citation omitted.) An employee in the general employment of one employer may be temporarily loaned to another so as to become a special or borrowed employee of the second employer. (Citation omitted.) Whether a person is an `employee' of the general employer or the special employer to whom he is loaned is determined by which employer had `control' of the `manner of performing [his] services.' (Citation omitted.) Where one entity `borrows' another's employee, workers' compensation law identifies one party as the `employer' and treats all others as third parties. (Citation omitted.)"

In Denison v. Haeber Roofing Co., 767 S.W.2d 862, 865 (Tex. App.-(city), 1989, no writ), the court provided additional guidance in stating that "[w]hen the right to control is not expressed in the contract between the employers, it is inferred from such facts and circumstances as the nature of the general project, the nature of the work to be performed by the machinery and employees furnished, length of the special employment, the type of machinery furnished, acts representing an exercise of actual control, the right to substitute another operator of the machine, etc. (Citation omitted.)" *See also* Marshall v. Toys-R-Us Nytex, Inc., 825 S.W.2d 193 (Tex. App.-Houston [14th Dist.] 1992, no writ history).

Since Employers 1 and 2 had no contract providing for the right of control of Claimant/respondent, the hearing officer had to determine that matter from the facts and circumstances revealed by the evidence. Whether or not Employer 2 controlled the details and manner of the performance of Claimant/respondent's job presented a fact issue for the hearing officer. He found that Employer 2 was in the position of sub-contractor to Employer 1, that Employer 1 hired Claimant/respondent, set his rate of pay, determined and kept his hours, paid his salary, but left his "technical supervision" to Mr. J since Employer 1 wasn't sufficiently familiar with Employer 2's tasks on the project to directly supervise such tasks. The hearing officer further found that while Employer 2 exercised some "loose control" over Claimant/respondent, it had no "right to control his employment" and that Employer 1 had the "right to control Claimant's employment activities." This case is close on its facts. However, we may not substitute our judgment for that of the hearing officer where, as here, there is some evidence of probative value to support his findings and they are not against the great weight and preponderance of the evidence. Texas Employers Insurance Ass'n v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The evidence

established that all Mr. J did was instruct Claimant/respondent in how to perform the admittedly simple tasks at the holding tank and that after such instruction Claimant/respondent performed such tasks for Employer 1 without any apparent day-to-day control exercised over him by Employer 2. *Compare* Texas Workers' Compensation Commission Appeal No. 91014, *supra*; Texas Workers' Compensation Commission Appeal No.91043 (Docket No. WA-00009-91-CC-2) decided December 9, 1991.

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge