APPEAL NO. 92188

This appeal arises under the provisions of the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). On April 8, 1992, a contested case hearing was held in (city), Texas , with (hearing officer) presiding as hearing officer. The sole disputed issue to be resolved was whether ((employer 1)), ((employer 2)), or ((employer 3)) was the employer of (claimant) (Respondent/Claimant) on (date of injury), when he sustained an injury (undisputed) to his back while working at (employer 3) and, consequently, which of the three companies' insurance carriers was liable for the payment of workers' compensation benefits. The hearing officer determined that Respondent/Claimant was the "borrowed servant" of (employer 3) and that its carrier is liable for his workers' compensation benefits. Appellant asserts on appeal that Respondent/Claimant was the employee of either (employer 1) or (employer 2) pursuant to a contract between (employer 2) and (employer 3), that (employer 1)'s carrier's policy establishes its responsibility to pay the benefits, and, that (employer 3) was not the employer as that term is defined in the 1989 Act. The carriers for (employer 1) and (employer 2) responded contending that (employer 3) exercised the right to control the performance of Respondent/Claimant's work, such not having been reserved by contract; that the contracts and parties (excepting Respondent/Claimant) were the same as those in a prior case before the Appeals Panel; and, that our prior decision is dispositive of the appealed issues. Respondent/Claimant did not file a response.

DECISION

Finding the evidence sufficient to support the hearing officer's determination that Respondent/Claimant was indeed the borrowed servant of (employer 3) when he sustained his compensable injury, we affirm.

On March 7, 1986, (employer 3) entered into a contract, dated February 20, 1986, with (employer 2) whereby (employer 2) was to furnish such employees as (employer 3) might request from time to time. (employer 2) was to provide, *inter alia*, "as to each employee, full workers' compensation". The contract stated that "[a]ll employees furnished to [(employer 3)] will be the sole employees of [(employer 2)], and any orders or directives given to the employees will be considered as given to and by [(employer 2)]." Also, (employer 3) was to furnish "all supplies and equipment such as tools, materials, and safety apparatuses."

On August 27, 1990, (employer 2) and (employer 4), Inc. (apparently a prior name for (employer 1)) entered into a contract providing that "(employer 4) will provide contract personnel services (employee leasing) . . . and other related services as may be agreed upon by [(employer 2)] and (employer 4)." This contract required (employer 4) to provide workers' compensation insurance covering all employees filling [(employer 2)'s] job positions under the contract. (Parenthetically, we note that the copy of this contract admitted into evidence at the hearing did not include its referenced Exhibits A and B which apparently

described such items as the commencement date of the contract, the employees and job functions, the fee percentages, and so on.) This contract provided that "[f]or certain purposes [(employer 2)] and (employer 4) may be considered joint employers of those employees, and job functions shown in Exhibit B who are under this contract personnel agreement." Of course, without Exhibit B we cannot discern whether Respondent/Claimant was to have been such a "joint employee."

Also in evidence was the relevant workers' compensation insurance policy insuring (employer 1), Inc. and containing an "Alternate Employer Indorsement" insuring (employer 2) Maintenance as an alternate employer.

Respondent/Claimant testified that sometime in 1990 he applied for a job at (employer 2)'s, was hired there by "Red" (Mr. M), took a physical, and was sent to work at (employer 3) where he worked for approximately one and one-half years as a "belt man" who "got large pieces of iron off a shaker onto a belt." On (date of injury), while shoveling mud, oil, and dirt, he slipped on a piece of iron, fell, and injured his back. According to certain medical records, his diagnosis was "lumbosacral strain" and he was conservatively treated throughout October. He testified that on a day-to-day basis he was supervised at (employer 3) for the most part by "(Mr. L)" and also by (Mr. S) and (Mr. B). He discussed any job problems with Mr. L or with Mr. S and it was Mr. S to whom he reported his injury and who sent him to a doctor. It was also Mr. S who laid him off on December 18, 1991 when the workload diminished. Respondent/Claimant could recall no supervision while at (employer 3) by any person from (employer 2), including "Red" Mr. M, and he never discussed a job problem with Mr. M. He understood his employer was (employer 2) and while he would go to work wherever Mr. M might send him, he would stay at (employer 3) if they would keep him. While the name "(employer 1)" was on his paychecks, which he received at (employer 3), he didn't know who "(employer 1)" was and thought (employer 2) was paying him. He thought (employer 1) might be an insurance company.

A transcript of a telephone interview of Mr. S (unsigned by Mr. S) was admitted, in which Mr. S stated that with respect to employees of (employer 2) and (employer 1) "while they are in our yard we've got complete control over them." According to Mr. S, neither (employer 1) nor (employer 2) had any supervisors at (employer 3) and their employees were under the direct supervision of Mr. S or others at (employer 3). He said such employees were requested from (employer 2) to work specifically for (employer 3) and that when such employees were sent out, "its up to us whether we want to hire them or send them down the road." (employer 3) could also terminate their employment.

(Ms. H), a claims representative for (employer 1)'s carrier, testified that (employer 1) was an employee leasing company. (employer 1) was previously known as "(employer 4), Inc." and "S Staffing, Inc." She said the carrier paid some of Respondent/Claimant's medical bills in October but later denied his claim. According to the Notice of Refused/Disputed Claim (TWCC-21) dated November 7, 1991, prepared by Ms. H predecessor, (employer 1)'s carrier denied the claim because Respondent/Carrier was a

"borrowed servant." (employer 1)'s lease agreement was with (employer 2); (employer 2) directed Respondent/Claimant to work at (employer 3); he was supervised by (employer 3) and not by (employer 2); and, (employer 3) "maintains the control over the details of the claimant's work and can fire (employer 2)'s employees if necessary." According to Ms. H, (employer 1)'s carrier would have paid benefits (apparently under the alternate employer indorsement) if Respondent/Claimant were found to be a (employer 1) employee leased to and controlled by (employer 2). Incidentally, the TWCC-21 filed by the carrier for (employer 2) stated as its reason for refusing or disputing the claim that, according to Lee Hill, a representative for (employer 2), Respondent/Claimant was an employee of "(employer 4), Inc." and not of its insured, (employer 2). The TWCC-21 filed by appellant refused the claim for the reason that Respondent/Claimant was a "(employer 1)-(employer 2) employee."

(Mr. H), a consultant who provides "liaison" between (employer 2) and various Texas state agencies, including the Texas Workers' Compensation Commission (Commission), testified that Respondent/Claimant was hired, at (employer 2)'s building, for (employer 1) by (Mr. M) who himself was employed by (employer 1). (employer 1) in turn leased Respondent/Claimant to (employer 2) for a fee. (employer 2) leases such employees to at least twelve clients including (employer 3). According to Mr. H, (employer 3) set Respondent/Claimant's hours and would provide him with any necessary tools and instructions. No (employer 2) representative would supervise him at (employer 3). (employer 1) does the hiring and determines the job site of employees but once they are at the site, the leasing company tells them what to do, be they a welder, a truck driver, etc. Mr. H said the parties "intended" such employees to be (employer 2) employees for workers' compensation purposes but that such intent changed when (employer 1) entered the picture in 1988 or 1989. After that time, (employer 2) understood that (employer 1) was responsible for the workers' compensation benefits. Prior to that time, (employer 2) alone leased employees for itself and its clients since 1980. Mr. H said that although the (employer 4), - (employer 2) contract states that (employer 2) "will be responsible for supervision and direction of employees," (employer 2) didn't actually supervise them. Referring to the provision in the (employer 2) - (employer 3) contract that the "orders and directives given to employees will be considered as given to and by [(employer 2)]", Mr. H said that (employer 2) didn't actually issue any orders in the daily supervision of such employees and that it was (employer 3) that issued the orders and provided the day-to-day details of the employees' activities. Mr. H understood the (employer 2) - (employer 3) contract to result in the retention by (employer 2) of "a certain amount of control" over leased employees like Respondent/Claimant in that (employer 2) finds work for them, tells them where to go to work, what the wages are, what time to report for work, and to whom to report.

We agree with the respondent carriers that Texas Workers' Compensation Commission Appeal No. 92053 (redacted Docket No. BU) decided March 27, 1992, is dispositive of the issues in this appeal, including the continued viability of the borrowed servant doctrine under the 1989 Act. In Appeal No. 92053 the parties were "(employer 4)", (employer 2), (employer 3), and another injured employee whose daily activities at (employer 3) were supervised by (supervisors. M, S and B). We considered the language

of a February 20, 1986 contract between (employer 2) and (employer 3) (ostensibly the same contract as is involved *instanter*) providing that "[a]ll employees furnished to [(employer 3)] will be the sole employees of [(employer 2)], and any orders or directives given to the employees will be considered as given to and by [(employer 2)]." We determined that such contract provisions did not control which entity had the "right to control" the employee and that, accordingly, the facts and circumstances surrounding his employment had to be examined to determine whether the employee became the borrowed servant of (employer 3). In the case *sub judice* the hearing officer found that (employer 3) both had the right to and in fact exercised actual control over the details of Respondent/Claimant's work and that neither (employer 1) nor (employer 2) had the right to control or exercised actual control over the details of his work. We are well satisfied as to the sufficiency of the evidence above recited to support the findings and conclusions of the hearing officer. We cite in support of this decision, Appeal No. 92053 (redacted Docket No.) decided March 27, 1992, and its development of the Texas case law concerning the continued efficacy and application of the "borrowed servant" doctrine under the 1989 Act. *See also* Texas Workers' Compensation Commission Appeal No. 92116 (redacted Docket No.) decided May 14, 1992, and Texas Workers' Compensation Commission Appeal No. 92172 (redacted Docket No) decided June 17, 1992, both of which cases involved leased employees and (employer 1) and (employer 2). Our agreement with the conclusions of the hearing officer that Respondent/Claimant was the borrowed servant of (employer 3) when injured disposes of all of appellant's appealed issues.

We have carefully considered all the evidence in the record and hold that the findings of the hearing officer were not based upon insufficient evidence nor were they so against the great weight and preponderance of the evidence as to be manifestly

unjust. In re King's Estate, 150 Tex. 662, 244, S.W. 2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Finding no error, the decision and order of the hearing officer are 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