APPEAL NO. 92287

On June 1, 1992, a contested case hearing was held. Unresolved issues from the benefit review conference included the following: (1) was the claimant (appellant herein) a borrowed servant and thus an employee of (employer) when he was stacking tires in the company 1 warehouse in mid-_____; (2) did the claimant satisfy the requirement of timely notice to the employer; and (3) assuming the claimant was a [employer] employee at the time in question, has the claimant suffered disability. The hearing officer held that appellant was injured in mid-_____ while stacking tires in employer's warehouse, but that appellant had not proven by a preponderance of the evidence that he was a borrowed servant and thus an employee of employer, nor that he gave timely notice of his alleged injury to employer, nor that he suffered disability as the result of his injury. The hearing officer thus ordered that appellant receive no benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant alleges error in the findings that employer did not oversee the work performed by appellant, that neither employer nor its assistant manager had the authority to direct or order (employer) employees, including appellant, to stack tires, and that if such was done it was at the employees' own discretion and without any anticipation of pay, and in the conclusion of law that appellant had not proved he was a borrowed servant. Appellant also challenges the findings and conclusion related to timely notice of injury. Respondent replies that the evidence supports the challenged findings and conclusions.

DECISION

Finding no error on the part of the hearing officer, we affirm.

The evidence in this case shows that in June 1989, appellant was hired as a tire serviceman by (tire service). His duties included providing 24-hour road service tire repair for 18-wheeler trucks. The tools and vehicle he used belonged to the tire service, although he had signed an agreement to lease his truck for $1 a month. He said he received approximately eight service calls a day, which were assigned by a dispatcher according to which serviceman was next up on the list. Appellant had the ability, within reasonable limitations, to accept or reject calls as they were assigned. He was paid on commission, a percentage of each call. Both parties stipulated that the tire service, which was not a subscriber to workers' compensation, was not being looked to as the employer as of the time of the incident.

The tire service had a contract with employer, a tire company, to do all its road service. In fact, the tire service was located on employer's premises, where appellant said he would stay during the day while waiting for service calls. Dispatching of service calls was done either by (Mr. Ta) or by (Mr. M), who worked for employer and not for the tire service. In addition, appellant said that between service calls many times he would do work for employer at employer's warehouse; he said (Mr. L), assistant manager of

employer, or employer's dispatcher, Mr. M would tell him what to do. Appellant said he complained about this several times to Mr. Ta because he did not get paid for doing work for employer. He said Mr. Ta told him to do as he was told because employer was the tire service's "bread and butter." He said a handwritten "Rules and Regulations" from Mr. Ta in November 1991 changed his job requirements so that "you had to do what [employer] said." Appellant also said employer "would pass you up if you didn't do what they told you to," and that that had happened several times, but no specifics were offered.

On _____, appellant testified he was stacking tires for employer at Mr. L's instruction. (He said that another tire service employee, (Mr. D), was assisting him). This was a task appellant had performed, at employer's behest, many times before; he had never received instructions to stack tires from Mr. Ta. He said Mr. L had showed him which tires to stack, where to stack them, and how to do it (10 high). Each tire weighed about 100 pounds, and the stack would be 6-1/2 to 7 feet high. That day, appellant said he stacked about 20-25 tires. His stomach hurt in the morning, a pain he said he had felt a week before while stacking tires for Mr. L, but which he dismissed as just a stomachache. That afternoon, the pain continued and when he found he could not pick up a tire, he told Mr. M that he was going to the hospital because he thought he had a rupture. He went to (hospital) at about 2:00 p.m., where he was told he had an umbilical hernia. He said he tried to call Mr. Ta that day, but spoke to Mrs. Ta who also assisted in the business. She told appellant they had no workers' compensation insurance. He said he did not call employer's office, because he assumed Mr. Ta would inform them. When he returned to work a few days later he told Mr. Ta he needed surgery, and also spoke to Mr. M; however, he didn't tell Mr. M how the injury occurred as he assumed he knew.

Appellant stayed with the tire service until December 2, 1991 when he was fired on suspicion of theft. He filed a notice of injury and claim for compensation on January 23, 1992. At the time of the hearing he was working for another tire company, but earning approximately half the wages he was making before. He said his current employer does not have work on the same scale as the tire service, which could be a reason for his wages being decreased. He still has trouble bending and stooping, and his hernia has never been repaired. Appellant also said he understood he was working for Mr. Ta and not himself, even during the period in which he was paying his own taxes.

Appellant said he was originally hired by Mr. Ta as one of his employees. It was his understanding that Mr. Ta would take care of Social Security, and it was not until six months later that Mr. Ta told appellant he needed to start paying his own income taxes. On September 30, 1989, he signed an agreement with the tire service where he agreed to operate as an independent self-employed tire repairman responsible for, among other things, taxes, Social Security, and insurance. The agreement said respondent also agreed that "he alone is responsible for his actions and work that he performs." Despite the language of this agreement, Mr. Ta began withholding taxes in July 1991. Appellant said the agreement was signed under duress, since Mr. Ta refused to pay him until the

agreement was signed.

On cross-examination appellant said he understood that for general purposes he was not employed by employer, in the usual sense of an employer/employee relationship. He also acknowledged that employer furnishes no tools or equipment, except for tire mounting compound and inner tubes, and that the equipment used to change the tires came from the tire service. He also said employer withheld no taxes, paid no unemployment, didn't set his hours, and paid no benefits or insurance.

Mr. M, employer's dispatcher, said that the tire service was a subcontractor hired to do service calls on employer's accounts. To his knowledge, appellant was not an employee of employer, and employer did not furnish appellant tools or equipment or control his work and could not fire him. He said the only work he had asked appellant to do was in connection with service orders. He said that on occasion the assistant manager, Mr. L, would ask tire servicemen to stack tires and that they had complained, but that nothing would have happened to them had they refused. He said he thought employer would go directly to an individual like appellant for help in stacking tires, and not ask Mr. Ta's permission.

Mr. M said he had not formally been told of appellant's on-the-job injury, but that he knew in passing that he had been injured. If appellant had been injured while stacking tires, however, he said it properly would have been brought to Mr. Ta's attention and not to his own. He said Mr. Ta originally referred to the tire servicemen as his employees, and that later in working with them he found they were subcontractors.

Mr. D, a tire serviceman who had worked for the tire service for about a year, testified that he was not an employee of employer, and that he had been asked every day to stack tires for employer but had refused because "I don't work for free." He said he might have rolled tires to appellant while the latter was stacking them, but he did not recall appellant being injured in _____.

Mr. Ta, the owner of the tire service, said he was a subcontractor to employer. He said the employment agreement dated September 1989 was not signed by appellant under duress, and that he made it clear to appellant and his coworkers that they were not employees. He said they received higher pay and that they understood they had to pay all their insurance and taxes. He said he also told them he did not carry workers' compensation insurance. He said he started withholding income tax July 1, 1991 on the advice of his accountant, who told him none of his people were paying their taxes. He said he also paid Social Security, and began paying unemployment at the beginning of this year because of a Texas Employment Commission audit.

Mr. Ta said he was not aware that any of his people were stacking tires for employer, except through hearsay. He said there was no pressure on his people to do

work for employer, and had not told them they had no choice and would be fired if they did not perform this work.

A handwritten "Rules and Regulations" of the tire service which was entered into evidence contained the following provision:

> From this point on, customer relations must change concerning [employer] customers and [employer] as well, since [employer] is our largest customer and our source of life. Complaining, cussing, frowning, temper tantrums, disagreeing will stop when it comes to [employer] and our other customers. If you have a problem there is only one person to deal with and that is [Mr. Ta]. This especially pertains to [employer's] dispatcher, when you are dispatched take your tires needed and invoice or service ticket and smile. No back talk of any kind is needed. If it is not your turn you can talk to [Mr. Ta] at a later time about it or any other problem you have with dispatcher.

Mr. Ta said these rules merely embodied prior procedures, and that the rule quoted above related to the tire service people deciding on their own not to take service calls and arguing with employer's dispatcher; that under those circumstances, he wanted his people to come to him instead.

The rule in Texas with regard to the "borrowed servant" doctrine is that a general employee of one employer may become the borrowed servant, or special employee, of another. Sparger v. Worley Hospital, Inc., 547 S.W.2d 582 (Tex. 1977). This doctrine protects the employer who had the right of control from common-law liability. Associated Indemnity Company v. Hartford Accident and Indemnity Co., 524 S.W.2d 373 (Tex. Civ. App.-Dallas 1975, no writ). The essential question in the determination is who has the right of control of the details and the manner of the work. Denison v. Haeber Roofing Co., 767 S.W.2d 862 (Tex. App.-Corpus Christi 1989, no writ). If the general employer controls the manner of an employee's performing services, the general employee remains liable, but if the employee is placed under another employer's control in the manner of performing services, the employee becomes the borrowed servant of that employer. Producers Chemical Co. v. McKay, 366 S.W.2d 220 (Tex. 1963). An individual may become a borrowed servant as to some acts and not to others. Hilgenberg v. Elam, 198 S.W.2d 94 (Tex. 1947). If the right of control is not expressed by oral or written contract between the employers, it may be 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, acts representing an exercise of actual control, the right to substitute another operator of a machine, and so forth. Producers Chemical, *supra* at 226. Sometimes the only reasonable inference to be drawn is that the general employer has retained the right of control. *Id*.

While the evidence is controverted in this case, we believe there is sufficient evidence in the record to support the hearing officer's finding that neither employer nor Mr. L had the authority to direct or order appellant to stack tires. There was no clear showing that Mr. Ta had ceded, either expressly or implicitly, his right of control over his employees to employer. Indeed, one employee, Mr. D, refused outright to do any work for employer. (We do not disagree with appellant that the fact employer did not pay appellant is not determinative of whether a borrowed servant relationship existed; we note, however, that performance without expectation of pay was merely one indication listed by the hearing officer in his findings of fact. Payment of wages is but one factor that should properly be considered in determining the employer-employee relationship, Goodson, *supra*.)

The case *sub judice* more closely resembles those in which an employee may perform services for the use and benefit of a third person without becoming the employee of that person. "[E]ven though an employee of one may be subject to the direction of a temporary master, no new relationship of employment is created if, in following the directions of the temporary master, he is doing so merely in obedience to the direction of, and in the general performance of his duties to, his original employer. United States Fidelity & Guaranty Co. v. Goodson, 568 S.W.2d 443, 447 (Tex. Civ. App.-Texarkana 1978, writ ref'd n.r.e.). While Mr. Ta's testimony seemed to indicate he had turned a blind eye to the situation, there was evidence characterizing employer as the tire service's "bread and butter," its "largest customer" and its "source of life." Under these circumstances any assistance provided employer, whether rendered in a cooperative spirit or under a sense of pressure, furthered the tire service's own interests.

We also believe there is sufficient evidence to support the hearing officer's determination that appellant's notice of injury to employer was not timely. Appellant said he told Mr. M he was leaving work to go to the hospital, but he did not say his injury was job-related. He said that he told Mrs. Ta on _____ (and subsequently Mr. Ta) that he had been hurt, but that he did not call Mr. M or anyone else with employer that day, thinking that Mr. Ta would tell them. He said he told Mr. Ta that he needed surgery and later told Mr. M; however, he said he didn't tell Mr. M how the accident occurred, as he assumed he knew. Mr. M said he found out appellant was claiming to have been injured on the job on _____ when he filed his notice of claim on January 23rd. Mr. Ta said when he talked to appellant on _____ appellant said he had hurt himself while working, and that that was what he had told the hospital in order to receive treatment. However, Mr. Ta said appellant told him no specifics about how he was hurt, and that he (Mr. Ta) did not report anything to employer. We believe these facts are insufficient to establish either timely notice or actual notice on the part of the employer.

We find the hearing officer's determination was not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The decision and order of the hearing officer are thus affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____

Robert W. Potts
Appeals Judge

_____

Susan M. Kelley
Appeals Judge