APPEAL NO. 92403

On July 14, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer found that the claimant (claimant), the appellant herein, was injured in the course and scope of his employment as a truck driver on (date of injury); however, the hearing officer determined that on the date of injury, the appellant was an employee of (Leasing Company), and not the borrowed servant of (Trucking Company). Leasing Company is a non-subscriber to workers' compensation insurance. Trucking Company was covered by workers' compensation insurance through respondent on the date of injury.

The appellant appeals the hearing officer's determinations that he was injured while an employee of Leasing Company, and that he was not a borrowed servant of the Trucking Company at the time of his injury. Appellant questions why Trucking Company, which the hearing officer found had no employees, would continue to carry workers' compensation insurance. Respondent emphasizes that appellant was an employee of Leasing Company, rather than its insured, on the date of injury, and that appellant was supervised by other employees of Leasing Company on-site. Respondent has not appealed the hearing officer's determination that an injury in the course and scope of employment occurred on (date of injury).

DECISION

We reverse the decision of the hearing officer, and render a decision that respondent is liable for workers' compensation benefits to the appellant, holding that the hearing officer erred as a matter of law in concluding that appellant was not acting as a borrowed servant of Trucking Company at the time of his injury. We hold that such finding of the hearing officer is against the great weight and preponderance of the evidence. We further hold that the Trucking Company, not Leasing Company, had the right to control the work of appellant.

Appellant had been employed as a truck driver by Trucking Company, a freight hauling company, since 1980. He was employed out of Trucking Company's (city) office. Appellant stated that the loading and unloading of trucks was part of a driver's job. He injured his back on (date of injury), while assisting other drivers with loading a crankshaft onto another driver's truck. He stated that the company forklift usually used for loading had been broken for several weeks. As a result of the injury, he had back surgery. Although eventually released to light duty, appellant was told that there were no light duty jobs, and let go from the Trucking Company. There is no evidence that Leasing Company attempted to locate any other jobs for the appellant.

Appellant testified that sometime after the first of the year in 1991, he was informed by his boss, (Mr. A), that, for purposes of lowering their insurance rates, the Trucking Company was going to "change" to Leasing Company. Leasing Company was located in (city). Mr. A presented him with an agreement to sign, and he was told that he could either sign the employment agreement with Leasing Company or be terminated. He was told that

the only things that would change would be where the paychecks came from, and who handled the insurance. In every other respect, appellant was told, the company would remain the same.

The employment agreement contains the following paragraph:

> "I am primarily seeking employment through [Leasing Company]. If employed, I understand that I will be an employee of [Leasing Company] and not of any client. I further understand that an agreement will exist between [Leasing Company] and [Trucking Company]. I further understand that I will never be charged a fee by [Leasing Company]. This certificate and application represents an agreement between myself and [Leasing Company]. I understand that any misstatement of material facts contained within may cause me to lose my employment with [Leasing Company]."

The rest of the form sets forth a brief accident reporting process, and basic identifying information about appellant. Before and after the change, appellant testified he was supervised primarily by Mr. A, the (city) branch manager, and occasionally by (Mr. L), who was located at the Trucking Company headquarters in (city). He stated that he never had on-the-job contact with anyone from Leasing Company. He said that the telephone at Trucking Company is answered with the name of the Trucking Company.

Mr. A, the (city) terminal manager for Trucking Company, stated he had been employed by Trucking Company since 1980. He agreed with appellant's version of the circumstances under which employment agreements with Leasing Company were signed. Although the attorney for the respondent characterized execution of the agreement as "the right" to choose Leasing Company, Mr. A indicated that he was told that he could either sign the agreement or seek employment elsewhere. Mr. A did not know the reasons for the change, which occurred around January 1, 1991, but surmised that saving money was somehow involved. He stated he also was an employee of Leasing Company, but that his job title and duties for Trucking Company remained the same. Mr. A stated he was supervised by Mr. L, who he in turn understood was supervised by (Mr. W) and (Mr. A), who were with Trucking Company. He agreed that the telephone was answered in the name of Trucking Company.

Mr. A stated that Trucking Company was regulated by the Texas Railroad Commission, and that, as part of such regulation, a tariff was issued to Trucking Company that set forth in detail the conditions under which Trucking Company would operate, with respect to routes, highways travelled, fares charged, and even the times that deliveries would be made. Mr. A indicated that the lunch hours of drivers were even accounted for in the times approved in the tariff. He stated that although he had authority to see that the tariff was carried out, he had no discretion to vary it. Mr. A stated that his instruction from Leasing Company was to carry out the tariff. Mr. A also stated that he trains new drivers according to "Trucking Company's instructions." He confirmed that loading and unloading

trucks was part of the job of drivers. He stated that it was his understanding that "all of the employees work for [Trucking Company] through [Leasing Company]" and that Leasing Company's role was to lease out the people to get Trucking Company's business performed. He stated he did not have hiring authority, but can recommend termination; Mr. A stated that he did not know if Leasing Company would be brought into a termination, and understood that a recent termination had been the ultimate decision of the owners of Trucking Company.

(Mr. L), general manager for Trucking Company, stated that he had been employed by Leasing Company since around mid-January 1991, under the same circumstances described by appellant and Mr. A, where the choice was between signing the employment agreement with Leasing Company or terminating employment altogether. Mr. L confirmed the restrictive nature of the tariff under which Trucking Company operated, and indicated that the tariff was issued by the Texas Railroad Commission to Trucking Company. He said it was extremely detailed, governed all operations of Trucking Company, and served essentially as a roadmap that the company followed. He had no knowledge of the reasons for the arrangement with Leasing Company. He stated that even the company owners, (Mr. A) and (Mr. W), were employees of Leasing Company, and that Trucking Company, to his knowledge, had no employees. He confirmed that Trucking Company was a corporation, and he unequivocally testified that ownership of all trucks, equipment, and facilities remained with Trucking Company. He stated that both he and terminal managers had day-to-day responsibility for complying with the tariff. A (month year) freight bill contained in the record lists the name of Trucking Company, but not Leasing Company.

The leasing agreement between Leasing Company and Trucking Company, executed January 16, 1991, states that Leasing Company is not a subscriber to workers' compensation insurance, and that it will provide alternate insurance covering employees "as heretofore disclosed . . ." The agreement provides that payroll information and the exact amount of payroll will be paid by Trucking Company to Leasing Company no less than 48 hours prior to each payroll due date, and, in addition, a 2.5% fee. So far as resolution of this case, we regard as relevant the following provisions of the contract between Leasing Company and Trucking Company (described as "Client" in the agreement):

> WHEREAS, [Leasing Company] has, or will employ, certain employees . . . to be located at CLIENT's place of business and perform services for CLIENT, and [Leasing Company] desires to lease to CLIENT the Employees to further the business of CLIENT, subject to the terms and conditions of this Agreement; and
>
> WHEREAS, CLIENT desires to lease from [Leasing Company] the employees in furtherance of CLIENT's business, subject to the terms and conditions of this Agreement.
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> . . . 5.SUPERVISION

(a)[Leasing Company] hereby designates (Mr. W) as the on-site supervisor (the "supervisor") of the employees assigned to fill job function positions for CLIENT. The Supervisor shall direct operational and administrative matters relating to service provided by employees.

(b)The supervisor shall determine the procedures to be followed by the employees regarding the time and performance of their duties . . .

6.ADMINISTRATION. [Leasing Company] and CLIENT each represent and confirm that [Leasing Company] is the sole employer of all personnel furnished by [Leasing Company] to CLIENT , and that [Leasing Company], with respect to the personnel furnished to CLIENT, shall perform all of the duties and responsibilities associated with an employer including, but not limited to, the following:

(i)Hire, fire, discipline, evaluate, and direct the work and conduct of all such personnel (by and through the supervisor).

(ii)Have sole control and responsibility for and be sole signatory under and in connection with all labor negotiations, grievances, collective bargaining agreements, and related items concerning said personnel.

(iii)Comply with all employment laws . . .

(iv)Make all proper payroll deductions for income tax, social security tax, and any other payroll taxes . . .

(v)Make all payments,including payments for income tax, social security tax, unemployment, and disability insurance, to the proper governmental agency or authority required under State and Federal laws to be made by [Leasing Company] as the employer of said personnel.

(vi)Prepare and file with the proper governmental agency or authority all returns and reports required in connection with this agreement.

12.GOVERNING LAW. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations created hereunder are performable in (city) County, Texas.

The agreement further states that it is the entire agreement between the parties "with regard to this subject matter." On behalf of Trucking Company, the agreement was signed

by (Mr. W), listed as President of Trucking Company.

A deposition was put into evidence over the objection of appellant (who noted that it had not been exchanged as required by the rules of the Texas Workers' Compensation Commission). This was given by (Mr. B), the risk manager for Leasing Company. In response to a direct question as to whether an employee was assigned to a particular location by someone at Leasing Company, he answered "No." In response to the next question about how employees were assigned to job sites, he stated "Let me clear that up . . . we assume as a function of our relationship with each client the full population of each client. As such, when each client hires someone, our employee at that location is doing the hiring. . . ." Mr. B stated later that "[t]he supervisor who is on our contract as named as the supervisor at that site supervises through delegation of everyone below him or her. We make great effort to ensure that that individual is an employee so that employees are supervising employees." Mr. B testified that "we do not provide insurance to them for occupationally incurred injuries in any manner. We do have a benefit plan that is not insurance . . ."

Respondent's assertion that appellant was Leasing Company's employee begs the question of whether appellant, at the time of his injury, was also a "borrowed servant" of its insured, Trucking Company. We have many times before cited the numerous Texas cases that stand for the doctrine that an employee of a general employer may become the borrowed servant of another. Sparger v. Worley Hospital, Inc., 547 S.W.2d 582 (Tex. 1977). We would further note that the borrowed servant doctrine protects the employer who had the right of control over the manner and details of the employee's work from common-law liability. Carr v. Carroll, 646 S.W.2d 561, 563 (Tex. App.-Dallas 1982, writ ref'd n.r.e.). To determine whether or not an injured worker has become a borrowed servant, the question is which company has the right to control the activities of the servant. In determining this fact, it is necessary to examine evidence not only as to the terms of the contract, but also evidence with respect to who exercised control, or such evidence that is relevant as tending to prove what the contract really contemplated. Halliburton v. Texas Indemnity Insurance Company, 213 S.W.2d 677, 680 (Tex 1948). The normal scope of business of the general employer and that of the special employer may be considered to determine the issue of "borrowed servant." Carr v. Carroll, *supra* at 564. Even in the case of a written contract, the trier of fact can consider other evidence to determine whether the contract is a sham or has been abandoned, *see* Newspapers Inc. v. Love, 380 S.W.2d 582 (Tex. 1964), or where the contract doesn't clearly speak to the right of control. Archem Company v. Austin Industrial Inc., 804 S.W.2d 268 (Tex. Civ. App.-Houston [1st Dist] 1991, no writ). While the court will look to any express contract, it need not be merely concerned with form over substance. Kemp v. Frozen Food Express, 618 F. Supp. 431 (E.D. Tx 1985). Issuance of paychecks and withholding of taxes is not conclusive of employee status. Mayo v. Southern Farm Bureau Casualty Co., 688 S.W.2d 241 (Tex. Civ. App.- Amarillo 1985, writ ref'd n.r.e.).

As previous decisions of the Appeals Panel illustrate, the fact that an employee

leasing company describes itself in a contract as an "employer" has no talismanic effect. *See* Texas Workers' Compensation Appeal No. 92039 (Docket No. redacted) decided March 20, 1992; *also* Texas Workers' Compensation Commission Appeal No. 92172 (Docket No. redacted) decided June 17, 1992. In this case, whether the agreement between Leasing Company and Trucking Company can be construed to confer right of control in the Leasing Company over the details of appellant's work for Trucking Company must be analyzed in terms of the Trucking Company's status as a motor carrier regulated by the Texas Railroad Commission.

Mr. A and Mr. L testified that a tariff which is fairly detailed and specific as to the routes, charges and times for making deliveries was issued, and that they had no discretion to change it. Mr. L stated that Trucking Company owned all trucks used to conduct its business. Mr. A and Mr. L confirmed that the tariff was issued to Trucking Company. There was no evidence that the Leasing Company was itself certificated or permitted as a motor carrier. Mr. A stated that he was directed by Leasing Company to make sure the tariff was carried out. Carrying out such tariff would, necessarily, mean compliance with the applicable laws and rules of the Railroad Commission.

TEX. REV. CIV. STAT. ANN. art. 911b (Vernon's Supp. 1992) defines motor carrier to include a corporation "owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this state . . . " Art. 911b, § 1(g). Motor carriers are required by this article to obtain the applicable certificate or permit from the Railroad Commission. Art. 911b, §§3. Texas Railroad Comm'n, 16 TEXAS ADMIN. CODE § 5.167(a) (Railroad Commission Rule 5.167) states:

> Supervision and control of regulated operations. The holder of a certificate or permit shall be obligated to exercise direct supervision and control of all operations performed under authority of its certificate or permit.

Railroad Commission Rule 5.167(b), having to do with unauthorized conveyance of operating rights, specifically lists activities reserved to the motor carrier.
This states, among other things:

> (b)(1)(A) Reserved acitvities. No person or entity other than the holder of a certificate or permit may . . . (v) exercise direction or control of personnel or equipment used in operations under a certificate or permit.

The rights conferred by Railroad Commission permits and certificates may not generally be delegated to another, such that the person making such delegation is relieved from liability to others for personal injuries. *See* Berry v. Golden Light Coffee Company, 327 S.W.2d 436 (Tex. 1959).

Given the testimony from Mr. A and Mr. L, it is clear that Trucking Company, the

corporate entity to whom the tariff was issued, maintained the right to control the work of the leased drivers and supervisors, in order to comply with the tariff. While it may be that it leased other persons to carry out the tariff, those persons did not have discretion to depart from the Trucking Company's tariff. Given the strong testimony concerning compliance with the tariff, as well as the leasing agreement clause expressly stating that it will be governed by the laws of the State of Texas, we cannot conclude that Trucking Company did not operate in accordance with applicable state law set forth above.

We would further note, as a matter of law, statutes governing operation of motor vehicles or operation as a certificated carrier become terms of contracts with those carriers. See Greyhound Van Lines Inc. v. Bellamy, 502 S.W.2d 586, 588 (Tex. Civ. App.- Waco 1973, no writ). The Waco Court of Appeals determined that TEX. REV. CIV. STAT. ANN. Article 6701c-1 governing operation of commercial motor vehicles over the public highways, provided that the truck lessee in that case shall have full and complete control over the operation of the vehicle, and that this requirement would have become part of the contract under consideration even if not expressly included. As in that case, the record here indicates that Trucking Company's trucks fall within the definition of commercial motor vehicles as defined by TEX. REV. CIV. STAT. ANN. art 6701c-1, § 1 (Vernon's Supp. 1977). Section 2 of this article (Vernon's Supp. 1992) requires that:

> "No commercial motor vehicle nor any truck-tractor shall be operated over any public highway of this state by any person other than the registered owner thereof, or his agent, servant, or employee under the supervision, direction, and control of such registered owner unless such other person under whose supervision, direction, and control said motor vehicle or truck-tractor is operated shall have caused to be filed with the Department [of Public Safety] an executed copy of the lease, memorandum, or agreement under which such commercial motor vehicle or truck-tractor is being operated." (emphasis added)

The exceptions to this statute do not appear to apply to remove trucking company from the scope of this law, based upon the testimony of Mr. A and appellant.

Therefore, even if we agreed that the leasing agreement controls the arrangement, the laws requiring Trucking Company to maintain operational control of its vehicles became part of the terms of the contract by operation of law. Although the Leasing Company may have the power to supervise appellant in some measure, supervision over the ends to be accomplished does not equate to the right to control the means and details of its accomplishment. *See* Thompson v. Travelers' Indemnity Co. of Rhode Island, 789 S.W.2d 277 (Tex. 1990).

Appellant has raised a pertinent inquiry as to why a Trucking Company would carry workers' compensation insurance if it had no employees. Respondent furnished no explanation in the record of the contested case hearing; its assertion in its response to

appeal, that termination of coverage was somehow an oversight, is without support in the evidence. Rather, explanation for coverage could be that Art. 911b, § 13, requires a motor carrier to carry either workers' compensation insurance or accidental insurance coverage for employees.

In this case, given that the contract between Leasing Company and Trucking Company necessarily includes the laws and regulations that govern Trucking Company as a regulated motor carrier, and those provisions mandate reservation of the right to control freight operations in Trucking Company, and given the further evidence that Leasing Company itself urged compliance with the Railroad Commission tariff, the evidence establishes, as a matter of law, that appellant was injured while acting as a borrowed servant of Trucking Company on (date of injury). In addition, a conclusion that the appellant was acting in the course and scope of employment for Leasing Company, and was not a borrowed servant of the Trucking Company at the time of his injury is so against the great weight and preponderance of the evidence detailing the right and responsibility of the corporate entity, Trucking Company, to carry out the tariff it had from the Texas Railroad Commission, as to be manifestly wrong or unjust. *See* Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

We reverse the decision of the hearing officer, and render a decision that appellant sustained a compensable injury while acting as a borrowed servant of Trucking Company and while furthering its business, and while acting in the course and scope of his employment as a borrowed servant, and that respondent is ordered to pay all medical and income benefits arising as a result of such injury, subject to credit for any income benefits already paid pursuant to interlocutory order of the Commission.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge