APPEAL NO. 92498

A contested case hearing was held in (city), Texas, on August 6, 1992, (hearing officer) presiding. The two issues before the hearing officer were the identity of Claimant's employer on the date of his injury, and whether or not Liberty Mutual Fire Insurance Company had issued a policy of workers' compensation insurance covering claimant's employer on the date of injury.

The hearing officer held that (hereafter "Employer") exercised actual control over the details of Claimant's work with an attendant right to control, and that Claimant on the date of injury was a borrowed servant of Employer and not an employee of Employer's contract labor supplier, (leasing company). The hearing officer also held that Employer's workers' compensation insurance carrier, Employers Insurance of Wausau, was not liable for payment of workers' compensation benefits to Claimant pursuant to its policy covering only Employer's executive staff.

Both Claimant and Employers Insurance of Wausau have filed appeals from this decision. Liberty Mutual Fire Insurance Company has filed a response. For convenience, Employers Insurance of Wausau will be referred to as "Carrier 1," Liberty Mutual will be referred to as "Carrier 2," and (leasing company), will be referred to as "Leasing Company."

Claimant disputes that the issue of identity of his employer was a disputed issue. He also contests certain findings of fact and conclusions of law, states that he is being punished as the result of a business deal between Employer and the Leasing Company, and says the hearing officer's decision will invalidate similar transactions throughout the state, leaving employees without workers' compensation coverage.

Carrier 1 contests the findings and conclusions that state Claimant was an employee or borrowed servant of Employer, rather than an employee of the Leasing Company. Carrier 2 essentially replies that the decision and order are supported by the evidence in the record.

DECISION

We affirm the hearing officer's determination that Claimant was the borrowed servant of Employer. However, we reverse and remand this case for further development of evidence on the issue of coverage under Carrier 1's policy of workers' compensation insurance.

It was undisputed that the Claimant, an iron worker, suffered injuries on (date of injury), when a piece of angle iron he was holding came in contact with an electrical line. He stated at the hearing that he is not presently working.

Claimant testified that on the date of his injury he thought he was working for

Employer. He applied for work at Employer's office after seeing a sign at a job site, and was interviewed by (Ms. R), the president. She told him she would have to talk to the foreman first, but she called him that night and told him he was hired. He said she may have told him during the interview that he would be a leased employee, but he did not remember for sure. Over the several months that he worked at this job, he showed up at job sites or at Employer's office, where he would be taken to job sites by truck. On the job, he reported to (GN), the foreman, to whom he was responsible for performing his duties. He said he thought GN worked for Employer. Employer provided certain heavy equipment for doing the work, but the Claimant furnished his own hand tools. During one period of light work, he was told by Ms. R that he was laid off.

Several of Claimant's pay stubs, which were made part of the record, were issued by (EMS) and by Subcontractors Services. Claimant said he also got checks from Leasing Company, but never a check from Employer. He noticed that his checks came "from another place," but he said he thought it had something to do with a company going bankrupt. He said the checks came by Federal Express from (city), and would be delivered to Employer's office.

Ms. R, the president of Employer, testified that her company had entered into a contract with EMS whereby EMS would provide Employer with leased employees. She said GN, the foreman, was a leased employee. She said her only role was to supply applications to EMS for their approval, and that she interviewed prospective employees if GN was not available. She said that Claimant filled out an "EMS services application" for employment, and that GN made the decision to hire Claimant. However, the application was not made a part of the record.

Two "Personnel Provision Agreements" signed by Ms. R were made part of the record. The first, signed July 16, 1990, was between Employer and Subcontractors Services, Inc., or Personnel Management, Inc. The second, dated September 15, 1990, was between Employer and EMS. Both contracts recited that these leasing companies are "in the business of seeking out and employing individuals, and through them supplying the personnel needs of various businesses who choose not to directly employ the personnel participating in their business activities." The contracts also provided that "[a]ll workers directed to customer [Employer] . . . and deemed suitable will be subject to direction and designation of manners and means of work performance totally by [Employer] during the course of their labor." The contracts also provided that Employer "in its sole discretion" may decide upon the suitability of workers directed to it, and that Employer, as these leasing companies agent, was empowered to hire and fire employees, although subject to mutually agreed upon guidelines. Responsibilities of these leasing companies included payroll and related functions, such as preparing and filing all necessary federal income tax forms, withholding and payment of all required taxes, maintaining workers' compensation insurance and performing administrative functions with respect to claims, and maintaining personnel records.

Two assignments of Employer's contract with EMS were admitted into evidence. The first, dated December 20, 1990, purported to assign the contract to Contingent Workforce, Inc., d/b/a EMS. The second, dated March 1, 1991, noted the previous assignment, and reassigned the contract to Conversion, Inc. Also admitted into evidence was the oral deposition of (J W), who had worked in a company which did payroll work for various leasing companies and their clients, including Employer. He testified that Employer's contract was assigned to other leasing companies in an effort to get workers' compensation insurance coverage for Employer. He further stated that the contract was ultimately assigned to (EBI), which he said was covered under a policy with Carrier 2. The certificate of incorporation and articles of incorporation for EBI were made part of the record. Also in the record was the affidavit of (J W), secretary and treasurer of (leasing company), which stated in part that on March 2, 1991, Employer's contract had been assigned, pursuant to oral agreement for less than a one-year period, to EBI; that the application and the policy of insurance for "(leasing company)" [Leasing Company] was a clerical error; and that the intent of the parties was that Carrier 2 provide workers' compensation insurance for EBI.

At the outset, we will address Claimant's contention that the identity of his employer was not a disputed issue. The benefit review conference report, which was made part of the record, included the following as a disputed issue: "Who did [Claimant] work for: [Leasing Company, EMS or Employer]? Did the borrowed servant doctrine apply?" At the hearing, the hearing officer stated this issue as "the identity of [Claimant's] employer on the date he was injured and consequently the proper workers' compensation carrier." No objection to this statement of the issue was tendered at the hearing. Issues that are not resolved at a benefit review conference and which are contained in the benefit review officer's report are the issues which are properly before the contested case hearing officer. *See* Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Articles 8308-6.15, 6.31.

In determining whether Claimant was employed by Employer, EMS, or Leasing Company, the hearing officer looked to all circumstances surrounding Claimant's employment. She made the following findings of fact:

5.On (date of injury), [Leasing Company] was the employee leasing company which provided contract labor to [Employer].

6.On (date of injury), [Leasing Company] subscribed to a policy of workers' compensation insurance issued by [Carrier 2].

7.Claimant was hired by the employee leasing company, pursuant to its contract with [Employer], and subsequently leased to [Employer].

8.[Employer] exercised actual control over the details of Claimant's work.

9.The employee leasing company did not exercise actual control over the details of Claimant's work.

10.[Employer] had the right to control the details of Claimant's work.

11.The employee leasing company did not have the right to control the details of Claimant's work.

The hearing officer also made the following conclusions of law:

4.At the time of his injury, Claimant was a borrowed servant of [Employer].

5.At the time of his injury, Claimant was not an employee of [Employer's] contract labor supplier, [Leasing Company].

Claimant contests the foregoing Findings of Fact and Conclusion of Law No. 5. Carrier 1 contests Findings of Fact Nos. 8 through 11, and both the foregoing Conclusions of Law. Carrier 1 argues that both parties to the written contracts--Leasing Company and Employer--in good faith agreed that employees would be employed by Leasing Company, and that the day-to-day activities of the work force were controlled by an employee of Leasing Company. The mere authority to control employees pursuant to the contract, Carrier 1 argues, should not be determinative. Further, it argues, Claimant was clearly advised that he was employed by the Leasing Company.

Whether the relationship of employer-employee exists is a question of fact. Holsworth v. Czeschin, 632 S.W.2d 643 (Tex. App.-Corpus Christi 1982, no writ). In the case of Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964), the Texas Supreme Court distinguished between the concepts of "exercise of control" and "right of control" over employees, and held that it is the latter that is the supreme test of whether the employee-employer relationship exists. The court noted that in cases where there is no express contract of employment or the terms of the employment are indefinite, the exercise of control may be the best evidence available to demonstrate the nature of the relationship, but that this exercise of control necessarily presupposes a right of control related to an express or implied agreement. Claimant clearly had no written contract of employment, either with Leasing Company or with Employer. Pursuant to the contract between Leasing Company and Employer, however, the Leasing Company purported to exercise the right to hire individuals to supply Employer's needs. Ms. R testified that she informed claimant of these circumstances at his interview, and that GN, Leasing Company's employee, approved claimant's hiring. Claimant also acknowledged that Ms. R may have informed him that he was a leased employee. Under these facts, we find support for the hearing officer's finding that Claimant was hired by Leasing Company and leased to Employer.

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). The essential question in the determination, as with the employer-employee relationship in general, is who has the right of control of the details and manner of the work. Denison v. Haeber Roofing Co., 767 S.W.2d 862 (Tex. Civ. App.-Corpus Christi 1989, no writ). If the general employer controls the manner of an employee's services, the general employer retains liability, but if the employer 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). The contract between Leasing Company and Employer evidences an intent between those parties that Employer, following hiring, assume the right to control the employees. In addition, there is sufficient record evidence--including Claimant's testimony that he was hired, controlled and directed by, furnished equipment by, and at one point laid off by individuals who either actually or putatively worked for Employer--to support the finding that Claimant was under the actual control of Employer. As this panel said in Texas Workers' Compensation Appeal No. 92035 (decided March 12, 1992), "[i]t would be a real sleight of hand situation if an employer could perform all the hiring procedures, lead an individual to believe he was hired as an employee, put him to work at a site where he . . . and others of his co-employees were working . . . and then . . . not disclosing or otherwise making known any arrangements with another employer, disclaim any employee relationship when an injury occurs." We therefore conclude there was sufficient evidence to support the hearing officer's determination that Claimant was the borrowed servant of Employer.

We reverse the hearing officer's determination that Carrier 1 is not liable for payment of benefits to Claimant, pursuant to its policy of workers' compensation insurance. The record shows that this policy was a late-filed exhibit, and no expert or other testimony was adduced at the hearing with regard to the extent of coverage under the policy. Contrary to the assertion in Conclusion of Law No. 6, we are unable to ascertain from the face of the policy whether coverage is limited solely to Employer's executive staff. We note that the same concern is raised in Carrier 1's request for review, which states that its policy provided coverage for Employer's employees and not just its executive officers. We therefore remand this case to allow the hearing officer to further develop the evidence on this issue.

The decision and order is affirmed as to the hearing officer's determination that Claimant was the borrowed servant of Employer. The decision and order is reversed and remanded for the further development of evidence on the issue of whether Employer's policy of workers' compensation insurance covers Claimant. Pending resolution of the remand, a final decision has not been made in this case.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge