APPEAL NO. 92678

This appeal arises under the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq.* (Vernon Supp. 1993). On July 15, 1992, a contested case hearing was held in (city), Texas, before (hearing officer), hearing officer. The sole issue in dispute was whether the claimant, who is the respondent herein, was an employee of (CDB), a personnel services company and non-subscriber to workers' compensation insurance at the time of injury, or (Baldwin), a subscriber to workers' compensation insurance. The hearing officer determined that although claimant was employed by CDB on (date of injury), the date of injury, he was leased to Baldwin and sustained a compensable injury while acting as a borrowed servant of Baldwin. The hearing officer ordered Baldwin's workers' compensation insurance carrier (appellant in this action and hereinafter called "carrier") to pay claimant's medical and income benefits.

On appeal, the carrier challenges certain of the hearing officer's findings of fact and contends that the hearing officer erred as a matter of law in concluding that claimant was acting as the borrowed servant of Baldwin; it further argues that the evidence is factually insufficient to sustain the hearing officer's findings. Carrier cites authority in support of its position. It also argues that by accepting benefits pursuant to CDB's medical and disability plans, the claimant has made an election of remedies and is estopped from claiming benefits under the 1989 Act. The claimant cites argument and authority in support of the hearing officer's decision.

DECISION

We affirm the decision and order of the hearing officer.

The claimant, a truck driver who hauled goods interstate and between points in Texas for Baldwin, a licensed motor carrier, was seriously injured on (date of injury). On that date, after having brought in a load to (city), he fell from the cab of the tractor-trailer parked in Baldwin's truck yard and hit his head on his pickup, parked nearby. As a result of the accident, he has no use of his legs and only slight use of his left arm.

The sole issue in this case is who was claimant's employer on the date of injury. Carrier maintained that claimant was the employee of CDB, a personnel services company which is not a motor carrier but which instead furnishes personnel for several companies including Baldwin. (Mr. DB) testified that he is the owner of CDB and the president of both CDB and Baldwin, which are located at the same address. Baldwin, which is not incorporated, is owned by his father, (Mr. CB), who is vice president of both CDB and Baldwin. Mr. DB stated that Baldwin, which holds a certificate of public convenience and necessity from the Texas Railroad Commission (Railroad Commission), owns the tractor-trailers which claimant and other personnel drive. He said that as of (month year) CDB had approximately 105 employees, while Baldwin had two (himself and a secretary). He said CDB and its employees operate as independent contractors to Baldwin, pursuant to a contract between the two which was in force on the date of claimant's injury (see further

discussion herein).

Both claimant and carrier introduced documentary evidence bearing upon the relationship between the two companies and claimant. These included the following:

1. "Driver's Daily Logs" listing claimant as driver and Baldwin as carrier. Each of these logs showed daily mileage, hours driven, and hours off duty, in sleeper berth, and on duty (not driving).

2. Payroll records reflecting payment to claimant from CDB. Both Mr. DB and claimant testified that claimant was always paid by CDB and never by Baldwin.

3. "Final Driver Trip Reports" prepared by Baldwin and showing claimant's expenses and the origin and destination of loads. Mr. DB stated that these were used to calculate claimant's wages.

4. A copy of an advertisement in the December 14, 1990 (city) Daily News. The ad stated in part that Baldwin "is now hiring drivers for over-the-road refrigerated trucks. . . .We have mileage pay, stop pay, paid loading and unloading, vacation pay, hospitalization insurance and credit union. . . .We require 2 years experience, good MVR, be able to pass DOT physical back x-ray and drug screen. . . ." An attached affidavit from an employee of claimant's attorney stated that he examined copies of the (city) Globe News for December 1990 and January 1991 and that he found advertisements for truck drivers on behalf of Baldwin running daily from December 14, 1990 through January 16, 1991, but that no such ads were placed by CDB. Mr. DB testified that the purpose of the advertisement was to solicit drivers to operate transport trucks for Baldwin.

5. Several memoranda and notices on Baldwin letterhead, some signed by Mr. DB, and addressed to either claimant, to "all long-haul drivers," or not specifically addressed. These included the following:

-- Detailed company procedures with regard to, e.g., fuel purchases, use of vehicle inspection reports and other forms and reports, and travel advances.

--A letter from Mr. DB to claimant, receipt of which claimant acknowledged with his signature dated February 4, 1991, stated in part that "Baldwin. . .grants permission to you as a driver/employee to log as 'off-duty'. . . ." Notes from a June 22, 1990 drivers' meeting instructed drivers about a variety of procedures.

--A page entitled "Who's Who" which listed Mr. CB as owner of Baldwin and Mr. DB as its president. It also listed (LC), (FA), and (MM)

as dispatchers for Baldwin and stated how long each had "been with the company. . .as a driver and dispatcher." Mr. DB testified that each of these individuals, to whom claimant reported, were employees of CDB.

6. A map of the United States, denominating a shaded area west of the (state) River as Baldwin's "Area of Operations."

7. Notices from CDB concerning discontinuation of workers' compensation insurance coverage. The first notice of noncoverage, signed by Mr. DB as president of CDB on July 10, 1990, notified "employees of the undersigned" that CDB rejects the provisions of the Texas Workers' Compensation Act. A handwritten notation at the bottom of the notice said "Mailed 7/10 to Industrial Acc. Board-return receipt." An undated notice from Mr. DB and signed by claimant on February 4, 1991, notified employees that the company had discontinued workers' compensation insurance. Also admitted into evidence was a Form TWCC-5, Employer Notice of No Coverage, signed by Mr. DB on behalf of CDB on March 23, 1992. Copies of certified mail receipts addressed to the Commission and showing a delivery date of April 9, 1992, were attached, but nothing indicated whether the TWCC-5 had been sent certified.

On cross-examination claimant identified his signature on the February 4th notice to employees, but testified that he was not aware that the accident insurance provided to CDB's employees was in lieu of workers' compensation insurance.

8. "Driver's Application for Employment" for CDB, filled out and signed by claimant on January 30, 1991. Claimant stated that he brought the application to Mr. DB, who interviewed him for the position but who did not mention CDB. Mr. DB confirmed that he took the application personally and interviewed claimant.

9. "Drug and Alcohol Abuse Policy Statement" on CDB letterhead and signed by claimant on February 4, 1991.

10. Undated and unsigned mileage pay scales for single and team drivers, on CDB letterhead. Mr. DB testified that this was given to claimant.

11. 1991 Form W-2 for claimant, showing CDB as employer. Mr. DB stated that claimant's pay came from CDB and was reported by that company to the Internal Revenue Service.

12. Undated and unsigned "Instructions on Handling on-the-job Accidents" on CDB letterhead.

Also made part of the record were two service contracts between Baldwin and CDB. In the first contract, entered into on August 3, 1988, CDB agreed to provide Baldwin with

drivers and other personnel to be utilized by Baldwin in its trucking operation, in return for payment of 30 percent of Baldwin's gross monthly payroll. The contract provided that CDB would be responsible for paying all personnel and for providing workers' compensation insurance for all personnel supplied under the contract. It also gave CDB sole responsibility for complying with all state and federal laws regarding withholding of wages for tax and social security purposes, and for ensuring compliance with the Fair Labor Standards Act. The contract provided that all personnel provided by CDB would be subject to review and approval by Baldwin prior to employment, and that Baldwin could reject any personnel supplied by CDB at any time. An amendment to this contract effective July 12, 1990 deleted in its entirety paragraph (4) concerning workers' compensation and substituted a new clause providing that CDB would not provide workers' compensation insurance coverage for personnel supplied to Baldwin, and any insurance benefits provided by CDB would be within the sole control of that company.

A new contract effective January 1, 1991, which superseded the prior agreement, contained many of the same provisions. However, it contained the following new paragraph:

> In providing such personnel, [CDB] shall be an independent contractor, and all personnel provided by Baldwin shall be employees of [CDB] and not employees of Baldwin. [CDB] shall have the sole right to hire and fire such personnel; to establish hours, wages and other conditions of employment, and to control, direct and supervise all work performed by such personnel. Baldwin shall have no right or authority to control any of the foregoing matters, but it shall have the right to reject any personnel provided by [CDB] at any time, and in the event of a rejection by Baldwin, [CDB] shall provide a satisfactory replacement as soon as possible.

The second contract also contained the parties' agreement that CDB would not provide workers' compensation insurance, but in lieu thereof would provide accident, death and dismemberment insurance. Each of the above contracts and the amendment were signed by Mr. DB on behalf of CDB and Mr. CB on behalf of Baldwin.

Mr. DB testified that claimant's immediate supervisors were (LC) and (FA), who he said were CDB employees. He said claimant was dispatched by them, would call one or the other of them if he broke down on the road, and would report injuries to them. He said that whenever Baldwin wanted goods hauled, it would contact either (Mr. C) or (Mr. A) who would in turn contact a driver and give instructions regarding the load, the truck, and the origin and destination of the trip. He said that when a driver reported to work, or when he returned from a trip or reached a destination, he would call (Mr. C) or (MM), who he said worked for CDB, to get a new assignment. Mr. DB testified that he has no day-to-day contract with the drivers; that drivers never look to him for specific instructions or control; that he initially interviews the drivers and talks to them about once every two weeks or once a month; and that he gives load information to their supervisors. He described his function as a negotiator on behalf of Baldwin with customers that wanted to ship goods, who would

in turn pass the information about such business on to the dispatchers.

Claimant stated on cross-examination that when he reported to work he reported to (Mr. A) or (Mr. C); that he reported to them on a regular basis and that they gave him his instructions; that he talked to Mr. DB "a time or two," but could not recall any specific instructions from Mr. DB.

The carrier in its appeal takes issue with the hearing officer's finding of fact that claimant was a truck driver leased to Baldwin to drive trucks owned and operated by Baldwin, and with the finding of fact that the claimant sustained a spinal cord injury while performing duties under the supervision, direction and control of Baldwin. It also disputes the conclusion of law that claimant sustained a compensable injury while acting as a borrowed servant of Baldwin.

This panel addressed a situation analogous to this one in Texas Workers' Compensation Commission Appeal No. 92403, decided September 23, 1992. As here, that case involved a trucking company which operated as a motor carrier pursuant to Railroad Commission authority, although all its functions, including supervision and driving, were performed by individuals employed by a leasing company. An agreement between the two companies represented that the leasing company was the sole employer of all personnel, and that it would in that capacity perform all "duties and responsibilities associated with an employer." We noted previous decisions of the Appeals Panel stating that the fact that a leasing company describes itself in a contract as an employer has no "talismanic effect", Texas Workers' Compensation Commission Appeal No. 92039, decided March 20, 1992, and we stated that in determining which of the two companies had the right to control the activities of the employee (i.e., whether the employee had become a borrowed servant), other evidence would also be examined. Such evidence would include evidence with respect to who exercised control, Halliburton v. Texas Indemnity Insurance Company, 213 S.W.2d 677 (Tex. 1948), or other evidence of whether, in the case of a written contract, it is a sham or has been abandoned. Newspapers Inc. v. Love, 380 S.W.2d 582 (Tex. 1964). In Appeal No. 92403, we also said that whether the agreement can be construed to confer right of control in the leasing company over the details of the claimant's work for the trucking company must be analyzed in terms of the trucking company's status as a regulated motor carrier.

TEX. REV. CIV. STAT. ANN. art. 911b (Vernon Supp. 1992) defines "motor carrier" to include a person or company "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 statute to be licensed and certificated by the Railroad Commission. Applicable rules of the Railroad Commission (Texas Railroad Comm'n, 16 TEX. ADMIN. CODE § 5.167(a) and (b) (Railroad Commission Rules 5.167(a) and (b)) provide as follows:

(a)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.
>
> (b). . .(1)(A) Reserved activities. 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.

In addition to the motor carrier statute and regulations, TEX. REV. CIV. STAT. ANN. art. 6701c-1 (Vernon Supp. 1992), governing use of state highways, provides in Section 2 as follows:

> 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. . . .

Section 1 of that statute defines "commercial motor vehicle" to include "every motor vehicle, other than a motorcycle or passenger car, designed or used primarily for the transportation of property. . . ."

In reversing the hearing officer's decision and rendering a decision finding the claimant a borrowed servant of the trucking company, the panel in Appeal No. 92403 also stated the following: ". . .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). . . . 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 [claimant] 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 (citation omitted)."

We believe the same reasoning applies to the case before us. There was no dispute that Baldwin operated under Railroad Commission authority and that CDB, as a personnel company, did not. Furthermore, there was uncontroverted testimony that the trucks driven by claimant were registered to Baldwin; there was also no evidence that the exceptions of Article 6701c-1 had been invoked. Under the law and the facts of this case, Baldwin cannot avoid its statutory obligation to exercise direct supervision and control over persons performing acts under Baldwin's certificate of authority. In this regard, this situation is analogous to cases where a motor carrier has been unable to escape liability for negligent

acts performed by individuals allegedly not within the motor carrier's employ. Greyhound Van Lines Inc. v. Bellamy, *supra*; Berry v. Golden Light Coffee Company, 327 S.W.2d 436 (Tex. 1959). As the court stated in Berry, "It further seems well settled that one holding a certificate or permit authorizing him to operate [as] a motor carrier over the highways of the State may not delegate to another the rights conferred by such certificate or permit and then release himself from liability to those injured by the negligence of the wrongfully delegated party." *Id.* at 439. It would appear to us that this same rationale should extend to the individuals who perform the actual business authorized under the certificate or permit.

Finally, carrier argues that by accepting benefits pursuant to CDB's medical and disability plans, claimant has made an election of remedies and is barred and estopped from claiming benefits under the 1989 Act. The Texas Supreme Court in articulating a test for election of remedies has stated that a person's choice between inconsistent remedies or rights does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice. Bocanegra v. Aetna Life Insurance Co., 605 S.W.2d 848 (Tex. 1980). *See also* Texas Workers' Compensation Commission Appeal No. 92273, decided August 7, 1992.

In this case, the record contained only claimant's testimony indicating that he had gotten an unknown amount of health benefits and that he is receiving weekly disability checks. This constituted insufficient evidence for the hearing officer to have ruled that claimant had made an election of remedies.

For the reasons contained herein, the decision and order of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge