

APPEAL NO. 93053

On November 12, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issue before the contested case hearing was the identity of the employer of (employee), the appellant/claimant, at the time he was injured on the job, and, as a result, which carrier would be liable for payment of compensation.

The hearing officer determined that the claimant sustained a compensable injury on (date of injury), in the course and scope of his employment as a borrowed servant of Southern Iron (Company S), while working at its premises. He found that the carrier for Company S was liable for benefits, and that claimant was not injured in the course and scope of employment with either., (employee leasing company) or , (Company B).

The appellant/carrier, as carrier for Company S, argues that the contract between Company B and Company S establishes as a matter of law that claimant was an employee of either employee leasing company or Company B, contrary to the finding of the hearing officer. Appellant/carrier argues that employee leasing company and Company B were independent contractors for Company S. Appellant/carrier argues that there is no evidence of actual control exercised over the claimant, and that the right of control is retained by Company B in its contract with Company S. Finally, appellant/carrier urges us to consider that the intent of all parties was that workers' compensation insurance be furnished by the carrier for the employee leasing company.

The claimant has also appealed stating that the hearing officer erred by not finding that Company B was his employer. The other two carriers respond that the hearing officer's decision is correct, and note the applicability of other decisions involving some of the same companies and the same contracts.

The appellant/carrier filed a response that asserts two additional grounds of appeal: that the Appeals Panel has no statutory authority to issue precedential decisions, and that to the extent that the Appeals Panel engaged in rule-making in issuing prior decisions taken as precedent, that the agency has violated the Texas Administrative Procedure and Texas Register Act, as well as the due process clause of the Texas and United States Constitutions.

DECISION

As we believe that the contract between Company B and Company S does not control who had the "right to control" claimant, we affirm the hearing officer's decision that claimant was an employee (as a "borrowed servant") of Company S at the time of the injury, and its carrier is liable for compensation.

I.

FACTS DEVELOPED THROUGH TESTIMONY

The occurrence of a work-related injury was not disputed by any carrier in this case. Moreover, all companies involved had workers' compensation coverage on the date of injury, and the claimant's right to workers' compensation benefits is therefore not changed depending upon the identity of his employer for purposes of coverage. the claimant, was injured when hit by a piece of iron that was thrown in his direction, on (date of injury), while working as a truck driver for Company S. He stated that he worked for Company S as a result of being sent there by Company B, who had hired him through a man named (man)¹, approximately six weeks earlier. He was referred to Company B by his brother-in-law, who told him Company B had openings. Mr. M told him to report to Company S, specifically a man named (man). (man) referred him to an older gentleman whose name he could not remember, who instructed him about procedures at Company S. The claimant said he did not know for a fact who at Company S was employed by them and who was not.

He was assigned deliveries by people at Company S. The truck he drove belonged to Company S. Claimant did not load or unload the truck. He filled out daily paperwork for the truck, which was turned in to Company S. He stated that gasoline was supplied by Company S at its premises.

The claimant testified that he considered Company B to be his employer, and that terminating him would be the responsibility of Mr. Manes. He stated that Mr. M never came to Company S or gave him directions there. He said that employees for Company B had a separate time clock from that assigned to employees of Company S. He was instructed by persons at Company B to contact them if he ever had problems at Company S.

Claimant stated as far as he knew, the trucks did not display a Texas Railroad Commission number or travel interstate. He said that he received his paycheck that had the name of the employee leasing company printed on it, and this was his sole contact with employee leasing company.

When he was injured, claimant said the crane operator at Company S assisted him, and he then went to the office at Company S and reported the accident to (man). The claimant said that he believed that (man) was contacted and referred him to (medical), where he was taken by someone who was at Company S. The claimant stated that he thereafter went to Company B's office, where he reported the injury to (man).

¹ The transcript uses this name; we would note that the decision, however, refers to this gentleman as "(man)", with apparent reference to the same person.

Mr. (Mr. RB), the president of Company B, stated that (man) would not have had supervisory control over the claimant after he went out to work at Company S. He stated that when a contract was negotiated with Company S to provide workers, that it was intended that workers compensation coverage be an important part of that contract. He stated that he would not have entered into a contract with the employee leasing company, if he had understood that it would not ensure that persons sent to Company S were covered by workers' compensation. Mr. RB stated that he understood when he signed the contract that (Mr. F), who represented the employee leasing company, was also an insurance agent with the power to bind the employee leasing company's carrier.

Mr. RB testified that (man) was an employee of the employee leasing company, because that company was to hire "our supervision". He stated the opinion that the employee leasing company probably paid premiums for workers' compensation coverage on the claimant. Mr. RB stated that the contract between his company and Company S was correct as to the understanding about workers' compensation coverage. He stated that employee leasing company was not a party to that contract.

II.

CONTRACT BETWEEN COMPANY B AND COMPANY S

On February 20, 1986, a letter was drafted as the contract between the parties, signed by Mr. RB, and signed by Mr. L on March 7, 1986, for Company S. The second paragraph of this letter states "All employees furnished to [Company S] will be the sole employees of [Company B], and any orders or directives given to the employees will be considered as given to and by [Company B]. Should [Company S] desire to hire any [Company B] employees, the employee will be released by [Company B] upon [Company S's] request, as soon as a replacement can be hired." This is the sole provision relating to direction or supervision of persons provided by Company B to work for Company S.

The letter contract also includes extensive indemnification provisions whereby Company B agrees to defend and hold Company S harmless for personal injury or death arising from performance of the contract. A provision is specifically made whereby Company B agrees to promptly pay to Company S, upon demand, "any sums paid under or in accordance with the workers' compensation law" relating to injury or death of employees of Company S. The indemnification does not apply where loss is caused or contributed to by the sole negligence of Company S.

Company B promised that it would "pay all state and federal payroll taxes and will provide, as to each employee, full workers' compensation, federal old age benefits, and state

unemployment insurance to the extent required by applicable law." The only specific reference to insurance coverage that Company B agreed to provide was that it stated that it would "carry and maintain, and have in full force and effect, public liability insurance endorsed to include broad form contractual liability insurance coverage. . .", and agreed to furnish certificates of such insurance to Company S.

This agreement was amended on August 20, 1987 to broaden the indemnification to cover loss caused by Company S's negligence. An amendment executed April 17, 1989, purported to amend provisions relating to "general liability and automobile liability insurance to be provided by [Company B], as provided for in the contract. . .", specifically, that an endorsement on such policies be made in favor of Company S as an additional insured, and that Company S reimburse Company B for premiums for the endorsement. A third amendment was executed May 31, 1990. This amendment broadens the definition of Company B and Company S as used in the contract, to essentially include other affiliates and related companies of each. For Company S, the definition also extends to all "of their respective gents (sic), servants, employees, legal representatives, insurers, receivers, assigns, officers, directors, and each of their heirs, successors, and assigns."

The indemnity provisions in favor of Company S were clarified and changed to include indemnification for actions of subcontractors. The specific insurance provisions were again redrafted, and expressly included only "public liability insurance" and "automobile liability insurance." The public liability insurance was agreed to also cover contractual liability insurance coverage. Company B agreed to provide certificates of insurance relating to these express policies.

In summary, aside from Company B's general agreement to provide full workers' compensation for each of its employees, or to indemnify Company S under certain circumstances for workers' compensation it paid on behalf of its employees, there is no specific agreement to provide a workers' compensation insurance policy.

III.

CONTRACT BETWEEN EMPLOYEE LEASING COMPANY AND COMPANY B

Because employee leasing company was not a party to the contract between Company B and Company S, we regard the contract it transacted with Company B, nearly four years after the Company B/Company S contract, as not controlling on the issue of right of control over claimant. And, as shall be noted herein, that contract makes clear that Company B is regarded as the controlling employer as between that company and employee leasing company.

The contract is dated August 27, 1990, and signed by Mr. RB and Mr. F. It

incorporates exhibits that are not obviously attached to the contract. It states that "for certain purposes, [Company B] and [employee leasing company] may be considered joint employers of those employees. . ." It does appear that employee leasing company agreed to furnish and keep in full force and effect workers' compensation insurance to cover the employees filling Company's B's job positions. *Provision IV (D)*. The agreement states, however, that Company B will be responsible for supervision and direction of employees. *Provision V (A)*. An earlier letter dated August 17, 1990, to Mr. RB from Mr. F, describes employee leasing company as the "W-2 employer" and Company B as the "operations employer."

IV.

This inquiry is restricted to determining which carrier has liability for compensation under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-3.01 (Vernon Supp. 1993) (1989 Act) and ancillary provisions of that Act, taking into account applicable case law. The employer's reports of injury that are in the record are not dispositive of the issue that was before the hearing officer. See Article 8308-5.05(b).

As a start, we note that no one has proven facts to contradict evidence that the claimant was injured while performing duties for Company S. It is uncontroverted that he was performing activities that had to do with, originated in, and furthered the business of Company S. The president of Company B himself disavowed that employees of his company would have directed claimant's activities at Company S. The sole dispute is whether claimant acted as an "employee" of Company S when he was so injured. We affirm the hearing officer's determination that he was so acting.

The applicability of Article 8308-3.05 to these parties was neither developed in the evidence at the contested case hearing nor argued by any of them. Specifically, there is not any direct evidence that would allow us to analyze whether Article 8308-3.05(h) would come into play.² Consequently, the situation must be analyzed in terms of statutes and case law that govern employee and employer status in light of the "borrowed servant" doctrine.

We do not agree with either appellants' assertion that a simple designation of person as "employees" of Company B, or a provision that all directions given to such employees

² Article 8308-3.05(h) states: If a person who has workers' compensation insurance coverage subcontracts all or part of the work performed by the person to a subcontractor with the purpose and intent to avoid liability as an employer under this Act, an employee of the subcontractor who sustains a compensable injury in the course and scope of the employment shall be treated as an employee of the person for purposes of workers' compensation and shall also have a separate right of action against the subcontractor, which right of action does not affect the employee's right to compensation under this Act.

are directions from Company B, necessarily constitutes reservation of the right of control, such that the finder of fact is precluded from looking "behind" such language in the contract to determine who actually had the right of control. The Appeals Panel has previously held that the "borrowed servant" doctrine is viable under the 1989 Act. Appeals Panel Decision No. 91005 (Docket No. AV-0003-91CC-4), decided August 14, 1991. The definitions of "employer" and "employee" set forth in Art. 8308-1.03(18) and (19) are virtually identical to those used in the prior law. See Article 8309, Section 1. It is presumed that a statutory amendment that does not change language interpreted by Texas courts indicates that the Legislature knew and adopted the interpretation placed on such language and intended the new statute to receive the same construction. See City of Lubbock v. Knox, 736 S.W.2d 888 (Tex. App.-Amarillo 1987, writ denied). Under the borrowed servant doctrine, no express contract of hire is required to establish an employee/employer relationship for purposes of workers' compensation coverage.

Texas courts recognize that a general employee of one employer may, in certain circumstances, become the borrowed servant of another. Sparger v. Worley Hospital, Inc., 547 S.W.2d 582 (Tex. 1977); Carr v. Carroll, 646 S.W.2d 561 (Tex. App.-Dallas 1982, writ ref'd n.r.e.); U.S. Fire Insurance Co. v. Warden, 471 S.W.2d 425 (Tex. Civ. App.- Eastland 1971, writ ref'd n.r.e.). When both employers are operating under a contract, a court can dispose of the borrowed servant issue without the necessity of considering the facts and circumstances of the project only if that contract clearly and expressly assigns the right to control. Bucyrus-Erie Co. v. Fogle Equipment Corp., 712 S.W.2d 202 (Tex. App.-Houston [14th Dist.] 1986, writ ref'd n.r.e.).

In Sanchez v. Leggett, 489 S.W.2d 383 (Tex. Civ. App.-Corpus Christi 1972, writ ref'd n.r.e.), two oil field contractors agreed to loan their employees to each other when either was in need. All matters as to pay, taxes, etc., remained with the primary employer of the employee. That court said in holding that the borrowing contractor was liable for injury to a borrowed employee:

Although it is undisputed that the two employers had a contract that determined the employment status as between themselves and their employees, the contract did not contain the "magic" provision that determined the question of "right to control" the borrowed employee.

The requirement that "right to control" be expressly provided for in the contract is set forth as recently as Archem Co. v. Austin Industrial, Inc., 804 S.W.2d 268 (Tex. App.-Houston [1st Dist.] 1991, no writ) which cited Sanchez in calling for an express provision as to the right to control. This case further noted that gratuitous provision of workers' compensation benefits does not itself establish the employee/employer relationship. See also Texas Workers' Compensation Commission Appeal No. 91014 (Docket No. FW-00008-91-CC-3), decided September 20, 1991; and Texas Workers' Compensation

Commission Appeal No. 91043 (Docket No. WA-00009-91-CC-2), decided December 9, 1991, as to right to control.

Even when express provision of the right to control is set forth in a contract, the facts and circumstances may still be considered in determining "right to control." Highlands Underwriters Ins. Co. v. Martinez, 441 S.W.2d 666 (Tex. Civ. App.-Waco 1969, writ ref'd n.r.e.); Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964).

The fact that the parties intended for employee leasing company to carry workers' compensation coverage on employees provided to appellant will not defeat applicability of the "borrowed servant" doctrine to these facts. See Marshall v. Toys-R-Us Nytex Inc., 825 S.W.2d 193 (Tex. App.-Houston [14th Dist.] 1992, writ denied).

Regarding the points of appeal that the appellant/carrier raised in its response, we will note that these points were not timely filed and will not be considered. Article 8308-6.41(a). In any case, our determination of this case is based on the record developed herein, not on other decisions that have been based upon other records.

We recognize that the hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. Art. 8308-6.34(e) (Vernon Supp. 1992) (1989 Act). The hearing officer's decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We do not substitute our judgment for that of the hearing officer when the findings are supported by some evidence of probative value, and are not against the great weight and preponderance of the evidence. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. Civ. App.-Texarkana 1989, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We therefore affirm the decision in this case.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge