APPEAL NOS. 93074 AND 93075

These appeals arise under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). On November 13, 1992, a contested case hearing consolidating two claims was held in (city), Texas; the hearing was recessed and reconvened on December 4th, with the record closing on December 18th. The following issues were before the hearing officer:

1. Whether or not the Claimant was employed by (employer) on or about (date of injury), 1991;

2. Whether or not Claimant was employed by (employer) on or about (date of injury), 1991;

3. Whether or not Claimant was an independent contractor on or about (date of injury), 1991;

4. Whether or not Claimant was employed by (employer) on September 9, 1991;

5. Whether or not Claimant was employed by employer) on September 9, 1991;

6. Whether Claimant was an independent contractor on September 9, 1991;

7. Whether or not Carrier (either carrier and/or carrier) waived the issue of compensability by failing to timely contest the compensability of the injury on or before the 60th day;

8. Whether or not Claimant has disability and is entitled to temporary income benefits;

9. Whether or not Claimant received a bona fide offer of light duty and if so, by which Employer, if any;

10. Whether or not Claimant sustained a compensable injury while in the course and scope of his employment on or about (date of injury), 1991;

11. Whether or not Claimant sustained a compensable injury while in the course and scope of his employment on September 9, 1991, or if he just aggravated or exacerbated his injury of (date of injury), 1991;

With regard to two additional issues, it was stipulated by the parties that on the two alleged dates of injury (Carrier A) was the workers' compensation insurance carrier for the employer, also known as the (hereafter Company A), and that (Carrier B) was the carrier for company. (hereafter Company B).

Among other things, the hearing officer determined that on (date of injury) the claimant suffered a back injury while working on a DC-8 aircraft; that on that date he was not employed by Company A, was not an independent contractor, and was an employee (borrowed servant) of Company B; that he was unable to obtain or retain employment at wages equivalent to his preinjury wages from June 22, 1991 through the date of the hearing; that no bona fide offer of light duty was ever made claimant by Company B; and that he did not sustain a compensable injury while in the course and scope of his employment on or about September 6th or 9th, nor did he further aggravate his (date of injury) injury.

The sole appellant in this case, Carrier B, disputes the hearing officer's findings of fact and conclusions of law which concern the relationship, for purposes of determining employment, between claimant and Companies A and B. It also disputes the hearing officer's determinations that the claimant had disability and that his alleged September 6th or 9th injury did not exacerbate his earlier injury. Carrier A and claimant essentially argue in response that the record evidence supports the hearing officer's decision.

DECISION

We affirm the decision and order of the hearing officer, with modification to the period of disability found by the hearing officer.

The claimant, an aircraft sheet metal mechanic by profession, testified that in the spring of 1991 he was recruited by a temporary employment agency, Company A, as part of a contract to rework a DC-8 aircraft at Company B, located at Love Field. He was hired over the telephone by someone at Company A, reported to the personnel office at Company B, and was told to report to Sal Trippi (Mr. T) who worked directly for Company B. The W-4 he filled out was given him by a Company A coordinator, and he received paychecks from Company A.

On (date of injury), claimant testified that he and another person were to install a fire escape slide on the door of the airplane. Because they were unable to install it from the inside of the plane, they attempted to do it from the outside by using a cherry picker. While claimant was in the basket of the cherry picker, 10 or 15 feet off the ground, the slide began to inflate inside the basket, pinning claimant in and hurting his back and right side. When released from the basket, claimant was sent by Mr. T to Company B's clinic where he was treated with ice packs and painkillers. He called someone at Company B the next day to say he would not be at work; the following Monday, he called Mr. T, who told him to contact Company A. He found out that Company A had already heard about his accident, and was told that they did not want to file this as a workers' compensation claim, but rather wanted to pay the claimant's medical bills themselves.

The claimant saw Dr. Schaefer (Dr. S) on June 24th. He was initially taken off work, then Dr. S put him on light duty after being told by Company A that such was available. The claimant was sent to one of Company A's offices for about two weeks. He originally had been working part-time and going to physical therapy part-time, but stopped going into Company A's offices altogether when he started going to therapy full- time. During this time period, he continued to receive his full salary from Company A. After completion of his physical therapy Dr. S again released him to light duty work, but he was told by Company A that they had no work and he was terminated. On September 6th, which claimant said was about a week before he was told by Company A he was terminated, he went to Company B's facility to pick up his personal toolbox, which he had been required to furnish as part of his employment. He said his back started hurting again after he lifted the toolbox into his pickup truck, helped by an individual from Company A and one from Company B. He said he continued to be paid by Company A through September 14th.

I.

WHO WAS CLAIMANT'S EMPLOYER ON (DATE OF INJURY), 1991?

The hearing officer held that Company B provided claimant some tools, told him what to do on the job site, controlled his hours, told him when to take a lunch break, and supervised what he was doing when he was injured, and that Company A did not provide guidance or supervisory personnel on the job site. She further found that claimant was an employee (i.e., "borrowed servant") of Company B on (date of injury) and that he was not employed by Company A on that date. Carrier B contends that these findings are against the great weight and preponderance of the evidence in the case.

The claimant characterized himself as a "job shopper" who, since 1972, had obtained most of his jobs through personnel agencies because "contractors always make more money than directs [direct employees] do." He said Company A hired him over the telephone, agreed to a salary, and told him when and where to report. He filled out a W-4 per the instructions of a Company A coordinator; he said he was also given a Company B application but that he could not remember whether he filled it out. He reported to Mr. T, a Company B employee, who introduced claimant to one of the lead men. (Claimant testified that each lead man headed a crew; during claimant's employment, he worked for two different crews.) Most of the time, claimant said, he received his instructions from the lead man, who was a Company B employee who had the same or a greater degree of technical knowledge and worked alongside his team members, some of whom worked for Company A. Claimant described the lead man's job as "gives out the job duties . . . lines out the work that needs to be performed in sequences so that when it all goes together, it's in the right sequence . . ." For example, it was the lead man who advised claimant and his coworker to use the cherry picker to install the inflatable slide when other

methods failed. He also went to the lead man if he had questions. He stated that the lead man did not supervise details such as how to screw in a bolt or remove a rivet; rather, he "went through the ship and told you what he needed done and you went to your toolbox and started the job." He said he received no on-the-job instructions from any Company A personnel. He characterized his working arrangement as "one company controlled the work, and one company paid."

The claimant said that he did not remember entering into a contract with Company A at the time he was hired. He said he was not familiar with any business arrangements between Companies A and B, but that it was his understanding that there was a contract between the two companies to complete the DC-8 job within a specified amount of time. He thought when he was hired that the job with Company B was to last three to six months.

No contract between Companies A and B was put into evidence, and only limited testimony was elicited as to the companies' relationship. The transcript of the hearing shows the following exchange, in relevant part, between Company B's human resource manager and Carrier B's attorney:

Q:Does [Company B] have an agreement with [Company A] to make voluntary payments when someone is discharged from their association with [Company B]?

A:Yes, we have an agreement with several different contractors stipulating certain conditions.

Q:And in this situation here, did you have a--an agreement with [Company A] to make voluntary payments to its contractors after the contract had expired?
A:We had no agreement.

Q:Okay. When did [Company B's] contract that it had with [Company A], when did that end?

* * *

A:Well, it's an ongoing contract, but the installers, which [claimant] was a member of . . . that terminated on June the 28th, 1991.

Under Texas law, it is the entity with the right of control over the employee at the time of the accident that is the employer for workers' compensation purposes. Archem

Company v. Austin Industrial, Inc., 804 S.W.2d 268 (Civ. App.-Houston [1st. Dist.] 1991, no writ). A person in the general employment of one employer may be temporarily loaned to another so as to become a special or borrowed servant of the second employer; the key consideration is which entity retains the right to control. Producers Chemical Co. v. McKay, 366 S.W.2d 220 (Tex. 1963). Where, as here, there appears to be no contract which expressly addresses the issue, right of control may be determined by reference to the surrounding facts and circumstances. *Id*. at 226.

Carrier B in its argument references numerous indicia of control exercised by Company A, including recruitment and hire, payment of salary, use of identifying name tags, provision of paperwork such as tax forms and time sheets, and the fact that Company A sent claimant to a doctor and paid his doctor's bills. It also notes that Company A gave the claimant light duty work and that Company B did not control the details of claimant's work. Texas courts have recognized, however, that where one entity borrows the employee of another, there may be some division of authority between the parties as to the right to control the employee's performance of the particular task, although the law requires that one party be named the employer and all others be classified as third parties outside the purview of the workers' compensation law. Smith v. Otis Engineering Corp., 670 S.W.2d 750 (Civ. App.-Houston [1st. Dist.] 1984, no writ). Furthermore, the party that assumes primary responsibility for payment of workers' compensation benefits is not in every instance the workers' compensation employer; those circumstances are merely evidentiary, and not dispositive of the ultimate fact question of right of control. *Id*. at 752. We can see no difference here, where Company A, although insured, chose to pay the equivalent of workers' compensation benefits from its own pockets.

Upon review of the evidence in this case, we cannot find that the hearing officer erred in holding that the claimant was the borrowed servant of Company B. From his first day on the job, claimant reported to Mr. T, the Company B supervisor who assigned him to a team headed by a "lead man." Claimant testified that he was given his orders on a daily basis by the lead man, who was also an employee of Company B. While the claimant said the lead man did not instruct him in minutiae such as how to tighten a bolt, he stated that if he had been instructed by the lead man to use a different method he would have complied. He also stated that no employee of Company A ever gave him any instructions as to how to perform his work. We therefore find that the hearing officer's determination was supported by sufficient evidence and is affirmed.

II.

DOES THE CLAIMANT HAVE DISABILITY?

The hearing officer determined that claimant had disability beginning June 22,

1991, and continuing through the date of the contested case hearing, and that the claimant is entitled to temporary income benefits (TIBS) until disability ends or the claimant has reached maximum medical improvement.

"Disability" is defined in the 1989 Act as the inability to obtain or retain employment at the equivalent of preinjury wages because of a compensable injury. Article 8308-1.03(16). With regard to his ability to continue working after he was injured on (date of injury), 1991, claimant testified that he first saw Dr. S on June 24th; he said she ordered x-rays and took him off work, although her initial medical report shows she originally released claimant to full-time work as of July 1st. A June 24th x-ray report said it was under-penetrated for good evaluation of bone detail, but that the remainder of the lumbar spine did not appear unusual. A few days after his initial visit, claimant testified that he returned to Dr. S. She said she had spoken with Company A about light duty work, and Company A gave him a position in one of their branch offices. Claimant said he worked there for about two weeks, although he was allowed to leave if his back started hurting. He said he did very little light duty work and no regular mechanic's work such as stooping, bending or lifting. The record shows that Dr. S continued to see the claimant and to give him light duty releases from July 2nd through July 17th while he was being treated for lumbar/hip contusion. A July 16th CT scan of the lumbar spine, L2-S1, found it normal.

On July 23, 1991 claimant began a full-time work hardening program during which time he no longer went to work. A September 5, 1991 discharge summary from the Functional Capacity Assessment Center stated in part as follows:

> [Claimant] has progressed well in work hardening. He is able to perform and (sic) eight hour work day in a wood shop atmosphere. He is able to use all of the tools without difficulty. He is able to tolerate eight hours of walk, sit, and stand--if allowed to alternate positions--for eight hours a day . . . [claimant] complains of sporadic numbness and weakness in his leg. He is concerned that if he had a period of leg numbness while working in a confined space, he would not be able to climb out . . . I would recommend that when [claimant] returns to his previous type of work that he wear a safety harness for any above the ground work.

On September 5th claimant was seen by Dr. S for a follow-up evaluation following physical therapy. Dr. S wrote "although he continued to complain of soreness in the right lower back area, it was felt he could return to light duty." She released him as of September 9th with the restrictions of no lifting over 20 pounds and no excessive stooping or bending. At the hearing claimant testified that in his experience as an aircraft mechanic there was no time where he did not do excessive stooping, bending, or lifting seven to 10 pounds (his understanding of Dr. S's restrictions) on a daily basis. He also said he went back to Company A and asked for light duty work, but was told there was

none. His paycheck stopped shortly thereafter. He said he never talked with anyone at Company B about light duty work.

In a September 23rd letter Dr. S noted that on September 16th the claimant reported he had hurt his back on September 9th while picking up his toolbox. She said he was tender over the right mid to lower thoracic paravertebral and right lumbar areas, and she recommended he be evaluated at a spine rehabilitation center. On September 17th the claimant was referred to Dr T. While Dr. Te's report as provided by claimant had pages out of order and was poorly copied, the claimant's work status was still listed as "light duty (sitting produced discomfort)." The report also said "he states he is now worse with lifting, box caring (sic), reaching overhead and excessive stooping. Prolonged sitting causes interscapular pain worse than low back pain. Prolonged standing causes low back pain to be worse than interscapular pain . . ." The report also said interscapular pain had replaced low back pain as his chief complaint for the past two weeks, but it did not say whether the two were related. Claimant thereafter embarked on another round of physical therapy which the evidence shows continued, at least on an intermittent basis until April 3, 1992.

On April 29, 1992 claimant was seen by Carrier A's doctor, Dr. S (Dr. St). Dr. St said the claimant reported lower back pain and left leg pain on an intermittent basis. His diagnosis was low back sprain and contusion of the lumbar spine, by history. Dr. St said he did not find any positive objective clinical abnormalities, and said claimant could return to work without restrictions.

At the hearing the claimant testified that Dr. S had never rescinded her light duty work release, but that Dr. Te took him off work entirely, telling him he could be released after completion of a physical therapy program, and that Dr. Te hasn't released him yet. However, Dr. Te's records in evidence do not reflect this; his September 20th notes state, in readable part, "[h]is normal job is [unclear] and crawling through confined spaces and he is unable to do his [unclear] work." As noted above, it did not appear that Dr. Te did anything but continue claimant's light duty status. The claimant also testified that since being told by Company A in August 1991 that they had no further work for him, he has not sought work from Company B or anyone else. He was continuing to treat with Dr. Te at the time of the hearing; claimant said Dr. Te had told him he might reasonably expect to be released to return to work "if I could come through his program and stay on it regularly, approximately eight to ten weeks." Documents in evidence show claimant went to physical therapy in September and October of 1991 and in March and April of 1992.

The claimant also testified that he continues to have pain and that if he gets up or turns at an angle "it's like something locks in place, like a nerve or something gets hung up" in his lower back.

In determining whether disability exists, this panel had held that the 1989 Act does not limit the evidence that may be considered with regard to this issue. Texas Workers' Compensation Commission Appeal No. 92209, decided July 13, 1992. The hearing officer may examine all relevant medical evidence plus the claimant's testimony in deciding whether the claimant is physically capable of obtaining and retaining employment. In this case, there was evidence that Dr. S's limited work release had never been rescinded; there was also conflicting evidence as to whether Dr. Te had taken the claimant off work entirely or whether he also had released him to limited duty work. The hearing officer, as the sole judge of the relevance and materiality of the evidence, was entitled to believe the claimant's testimony that Dr. Te had kept him off work on a continuing basis. Further, the claimant's testimony--in this case, of continued pain and inability to bend, lift, or stoop--can establish disability, even where contradicted by medical evidence. Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992; Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

Upon review of the record, we cannot say that the hearing officer's determination was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). We do not substitute our judgment for that of the hearing officer even where, as here, evidence existed to support a different inference. Continental Bus System, Inc. v. Biggers, 322 S.W.2d 1 (Tex. Civ. App.-Houston 1959, writ ref'd n.r.e.); Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

However, it appears that claimant's uncontroverted testimony was that he returned to work at full salary for a two week period; for this period of time "disability" as defined in 1.03(16) would not exist. We therefore modify the decision of the hearing officer to make clear that "disability" did not exist for this two week period. For other periods when claimant did not work, but did receive payments from Company A, we would note that credits against the amount of wage for calculation of TIBS may be due under 4.23(c).[1]

III.

DID THE CLAIMANT REINJURE HIS BACK ON SEPTEMBER 6TH or 9TH?

The claimant testified that on September 6th he hurt his back while assisting in loading his toolbox into his truck. (The date is also referred to in some medical reports as

[1]4.06 may also apply to reimburse the company for amounts advanced; however, these matters were not directly raised either at the hearing or appeal and we therefore do not decide them here.

September 9th.) The hearing officer found that the claimant did not sustain a compensable injury while in the course and scope of his employment on or about those two dates, nor did he further aggravate or exacerbate his injury of (date of injury), 1991. Carrier B contends there is insufficient evidence to support this finding, and that in fact claimant was receiving a paycheck from Company A at the time of the occurrence; that his pain immediately increased; and that there is no medical evidence that lifting the toolbox did not exacerbate his condition.

We note that Carrier B apparently is not contending that the claimant's subsequent injury was the sole cause of his disability. As the Appeals Panel has previously stated, the aggravation of a prior condition is an injury in its own right and can be compensable. Texas Workers' Compensation Commission Appeal No. 92663, decided January 21, 1993. However, this panel has also held that "a bare assertion that an aggravation has occurred does not relieve the proponent of the burden of proving that an injury, as defined in Article 8308-1.03(27), has been sustained." Texas Workers' Compensation Commission Appeal No. 92643, decided October 18, 1992.

The evidence in this case is sufficient to support a determination that the claimant was not acting in the course and scope of his employment when retrieving his own tools from Company B, which had agreed to hold them for him during his time off work. The fact that the event occurred during a time when Company A was paying claimant's salary does not change this result. Furthermore, on September 23rd, Dr. S wrote of the incident that it was unclear to her whether he had reinjured himself or whether this was an exacerbation of the previous injury. Claimant himself testified that his back pain increased from a "five" to a "six or seven" (on a scale of 10) after lifting the box, and that the increased pain lasted approximately a week. He said it was his belief that the damage or harm to his body after the toolbox incident was "about the same" as before. Given these facts in evidence, we find supportable the hearing officer's determination that, in essence, the suffering of a compensable injury on or about September 6 or 9, 1991 was not established by a preponderance of the evidence.

Based on the foregoing, the hearing officer's decision and order are affirmed, as modified.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

FILING A CONCURRING OPINION:

I can accept the results reached in this decision; however, find somewhat troublesome the extended period of time in which the hearing officer finds disability continuing. The evidence shows that the claimant was capable and did perform some "light duty" for a period of time following his injury on (date of injury), 1991. However, the availability of "light duty" came to an end in either August or September 1991, apparently because there was no longer any such position in Company A. The claimant testified that he had not taken any steps to look for any type employment since September 1991.

While there may not be a specific requirement to seek employment, particularly if there is a medical restriction or limitation on the full performance of duty (*see generally* Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991; Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991), such should not be allowed to be a shield behind which a claimant can hide to continue drawing temporary income benefits. In this case, there is a lack of evidence developed to indicate reasonably available employment within the claimant's restrictions or limitations during the time span up to the date of December 4, 1992 when the hearing closed. Nonetheless, it seems to me that a fact finder could appropriately consider such a lengthy time span as a factor in determining continued disability particularly where, as here, extensive work hardening and therapy programs have been completed. Such consideration is not at all clear to me in this case given the posture of the medical evidence and other surrounding factors set out in the above decision.

Stark O. Sanders, Jr.
Chief Appeals Judge