APPEAL NO. 931102

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. art. 8308-1.01 *et seq*.), a contested case hearing was held in (city), Texas, on October 12, 1993, (claimant) presiding as (hearing officer). He determined that the appellant's (claimant) employer at the time of a (date of injury), injury was (employer) (a nonsubscriber to workers' compensation coverage), that the claimant established disability for February 1993 and March 1993, but that the claimant "would not present specific evidence as to the dates of her disability." Claimant appeals urging that at the time of her injury she was an employee or a borrowed servant of (company) who carried workers' compensation coverage with the respondent (carrier), and that she had presented sufficient evidence to establish her disability which continues since neither 104 week have passed nor has maximum medical improvement been reached. Carrier urges the determination that the claimant was an employee of (EMPLOYER) is not so against the great weight and preponderance of the evidence as to be manifestly unjust and that the hearing officer was correct in finding insufficient evidence of "compensable disability."

DECISION

Finding the evidence sufficient to support the decision of the hearing officer, we affirm with modification as set forth below.

It was not disputed that the claimant suffered some degree of injury in the course and scope of her employment on (date of injury), when she was hit in the leg by a forklift. The issues at the hearing involved who the claimant's employer was at the time of injury and whether she sustained disability as defined in the 1989 Act (Section 401.011(16)). The claimant was a seasonal employee working at various food processing plants at different times. In August 1992, she and some friends went to the (COMPANY) plant to apply for work, and she was subsequently hired by (Ms. DP). She was hit by the forklift on (date of injury) and sustained an injury to her leg which was treated by a company doctor. (Although she states she mentioned her back problem, such is not reflected in the earlier medical records and she subsequently saw another doctor for the back problems which she related to the accident.) After being off a couple of days, the claimant returned to work because, according to her testimony, she was informed that her employer would not pay for her lost time and she needed the money from working, and she continued working at the (COMPANY) Plant until there was "no more work." The claimant worked at two other seasonal jobs until January 31st when she was laid off and commenced drawing unemployment benefits. She testified that she hasn't worked since January because she feels bad and her "back and waist hurt alot." She also testified that the company would not authorize her to go to a chiropractor but that she subsequently did on her own. Earlier medical records do not describe a back problem but a report dated May 17, 1993, indicates a diagnosis of: (1) persistent post traumatic cervical, thoracic, and lumbar spondylogenic (annular tear) discogenic pain syndrome; (2) crushing injury with laceration to medial aspect of the lower left leg. An "educated" program and "activation" program to enhance a return to work along with work hardening was recommended.

Ms. DP testified that she was an employee of (EMPLOYER) and had been since May 1991 when (EMPLOYER) and (COMPANY) entered into a contractual agreement for (EMPLOYER) to provide hourly workers for (COMPANY). She also indicated that before the contract and after the contract ended between (EMPLOYER) and (COMPANY) that all of (EMPLOYER)'s employee's were employees of (COMPANY). She testified that she hired the claimant and that claimant's immediate supervisor, (L) was also an employee of (EMPLOYER). She stated that employment applications were in the name of (EMPLOYER), that the claimant was told she would be working for (EMPLOYER) and not (COMPANY) and that employees including the claimant were paid on checks issued in the name of (EMPLOYER). The shifts and hours worked by the (EMPLOYER) employees were controlled by (EMPLOYER). She testified that (EMPLOYER) was not a subscriber to workers' compensation coverage but that they did have a medical insurance policy and that it was explained to employees including the claimant that (EMPLOYER) was not going to have workers' compensation coverage.

A copy of the contract between (EMPLOYER) and (COMPANY) was in evidence. It contains a number of provisions regarding the responsibilities of the two parties including (COMPANY) being responsible for health and safety matters but does not, as the hearing officer found, specifically provide for the right of control of employees. The contract, in an addendum, provides for a list of (EMPLOYER)'s responsibilities and refers in another part to employees leased to (COMPANY) by (EMPLOYER). The contract does not provide for control of the details of the work of anyone but does state that (EMPLOYER) will provide no equipment to the employees. The contract does specifically provide that (EMPLOYER) "shall furnish and keep in full force and effect during the term of this Agreement, Workers' Compensation insurance covering all employees which ((EMPLOYER)) leases to ((COMPANY)) under this agreement . . . ."

The carrier terms the agreement between (EMPLOYER) and (COMPANY) as "innovative" and proper and urges that it establishes the claimant as an employee of (EMPLOYER). While we would not so benignly describe the contract or agreement here, and do not agree that it meets muster in clearly or adequately providing for the right of control of the detail of the work to be performed which would conclusively establish the claimant as an employee of (EMPLOYER), we do find that the evidence as presented supports the hearing officer's determination and conclusion that at the time of her injury, the claimant was an employee of (EMPLOYER).

Under Texas law it is the entity with the right of control over the details of the employee's work at the time of an injury that is the employer for Workers' Compensation purposes. Achem Company v. Austin Industrial, Inc., 804 S.W.2d 268 (Tex. App.-Houston [1st Dist] 1991, no writ). And, it has been held that where a contract sets forth and assigns, clearly and expressly, the right to control of an employee, consideration of the facts and circumstance surrounding a particular project or work function need not be considered (Bucyrus-Erie Co. v Fogle Equipment Corp., 712 S.W.2d, 202 (Tex. App.-Houston [14th Dist] 1986, writ ref'd n.r.e.); Achem, *supra)*, absent some indication of a "sham" or other

improper consideration.[1] *Cf* Texas Workers' Compensation Commission Appeal No. 93733, decided September 20, 1993. Also, it is recognized that a person in the general employment of one employer may be temporarily loaned to another so as to become a special employee or borrowed servant of the second employer. Producers Chemical Co. v. McKay, 366 S.W.2d 220 (Tex 1963).

Where there is no contract or agreement establishing the right to control the work, the employer-employee relationship may be established circumstantially by evidence of actual exercise of control. *See* Texas Workers' Compensation Appeal No. 93110, decided March 26, 1993, and Texas Workers' Compensation Commission Appeal No. 93647, decided September 13, 1993. We have noted that where a controversy exists over the employer-employee relationship and it is not resolved by the terms of a contract or agreement, no one factor in the surrounding facts and circumstances is necessarily determinative of the relationship. Appeal No. 93110, *supra*. The hearing officer specifically found, and we do not find a great weight and preponderance of evidence to the contrary, that the contract or agreement here did not specifically establish the right of control. He therefore could and did consider the facts and circumstances surrounding the employment and in doing so concluded that claimant was an employee of (EMPLOYER) who "controlled the hours, shifts and manner in which the claimant performed her work." *See* Texas Workers' Compensation Commission Appeal No. 92684 decided January 29, 1993; Texas Workers' Compensation Commission Appeal No. 93074/93075, decided March 15, 1993. *Compare* Texas Workers' Compensation Commission Appeal No. 931036, decided December 23, 1993; Appeal No. 93733, *supra*. Evidence at the hearing showed that at the time claimant was hired she was hired by (EMPLOYER), on their application form, that she was paid by (EMPLOYER), that she was advised she was an employee of (EMPLOYER), that (EMPLOYER) set her hours, shift and that she was under the supervision of a (EMPLOYER) employee at both the first (L) and second level of supervision (Ms. DP). The evidence presented at the hearing did not directly mention any control of the details of the claimant's work by (COMPANY) or its employees.

Under the circumstances, we do not find any sound basis to set aside or otherwise disturb the determinations of the hearing officer. The hearing officer is the fact finder and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.168(a) and 410.165(a). We do not substitute our judgment for that of the hearing officer where, as here, the findings are

[1]As we noted in Texas Workers' Compensation Appeal No. 93053, decided March 1, 1993, as is the case here, evidence was not developed in the contested case hearing nor any assertion made that Section 406.124 is applicable to the factual setting of this case. Rather, claimant's position was that she was an employee or borrowed servant of (COMPANY) at the time of her injury. Section 406.124 provides that "[i]f a person who has workers' compensation insurance coverage subcontracts all or part of the work to be performed by the person to a subcontractor with the intent to avoid liability as an employer under this subtitle, an employee of the subcontractor who sustains a compensable injury in the course and scope of employment shall be treated as an employee of the person for purposes of workers' compensation and shall have a separate right of action against the subcontractor. The right of action against the subcontractor does not affect the employee's right to compensation under this subtitle."

supported by sufficient evidence. Texas Workers' Compensation Commission Appeal No. 93805, decided October 20, 1993.

The unfortunate situation here, where a worker is left without workers' compensation coverage because of business arrangements coupled with the apparent failure of a company leasing employees to the business to obtain workers' compensation insurance coverage, may have been rectified by legislation relating to staff leasing services that became effective on September 1, 1993. Staff Leasing Services Act, ch. 994, § 11, 1993 Tex. Sess. Law Serv. 4349 at 4354 (Vernon), provides in pertinent part that for workers' compensation insurance purposes a leasing company and its client company shall be co-employers.

We briefly address the issue of disability although the disposition of the issue above renders this largely moot. First, we note the hearing officer's order indicates that the claimant take nothing from (COMPANY). The claim in this case was against the carrier and it is against the carrier that benefits or the denial thereof should be ordered. Next, the hearing officer found that the claimant established disability for February and March 1993 but concluded that the claimant "would not present specific evidence as to the dates of her disability." Apparently he found her testimony convincing as to disability during February and March 1993 but not thereafter. (This may have been because of the ambiguity as to the claimants usual or regular seasonal employment experience, e.g. she indicated there were periods when she did not usually work.) We have held that the testimony of a claimant alone may be sufficient to establish disability. Texas Workers' Compensation Commission Appeal No. 93901, decided November 19, 1993. And, we have held that the burden to establish disability is on the claimant. Texas Workers' Compensation Commission Appeal No. 931026, decided December 22, 1993; Texas Workers' Compensation Commission Appeal No. 93593, decided December 7, 1993. While it is recognized that occasionally a claimant may go in and out of disability over a period of time and in such case the claimant has the burden to show when such period of disability is re-established (Appeal 93953, *supra*), that was not the situation here. Rather, the claimant testified that she had not been able to work since January 30, 1993, because of her (date of injury), back and leg injury. It is not clear to us what specific evidentiary requirements the hearing officer was concerned with in his conclusion that the claimant would not present specific evidence as to the dates of her disability particularly since he was factually satisfied that she had established disability for February and March 1993. We do not find in the evidence any significant changed condition that occurred on April 1st that ended the already established disability. As we noted in Appeal No. 93953, *supra*, a "carrier has no duty to affirmatively prove (as opposed to coming forward with evidence of a changed condition which may give rise to an issue) that a claimant is not entitled to benefits." However, if disability is established (as the hearing officer found here), and the same conditions continue (as shown by the same evidence that initially established the disability) and there is no indication of any changed condition that would end disability, we believe the basic concerns of our opinion in Appeal No. 93953, *supra*, have been met. In that appeal we observed that the claimant is required to establish by a preponderance of the evidence the precise duration of the claimed disability from inception to termination. But for the circumstance that it is not necessary for the

ultimate disposition of this case, we would remand for clarification.

For the reasons set forth above and the correction of the order insofar as it relates to taking nothing from (COMPANY), the decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

Recognizing the right of control is a fact issue, I concur because the evidence against the hearing officer's decision does not amount to a great weight and preponderance. I agree that the contract does not reserve or delegate right of control (and this is consistent with how we viewed contracts with stronger language than this one).

It is unfortunate, for example, that more information was not developed about contract of insurance, under which the carrier seems to have extended coverage to (employer) cannery workers several months after the leasing agreement was executed (and spanning the date claimant was injured). A premium in excess of $49,000 was collected for such coverage. Also, I believe that "right of control' must be analyzed in light of whether a company, and not individual supervisors on the corporate ladder, maintains control over the details of an employee's work. In this case, DP testified that her supervisors were employees of (employer); although there may have been two layers of supervision between DP and claimant that were described as employees of leasing company, I would have liked to have seen more factual development of who set ultimate policy for the manufacturer of food products. The record contains no information about how the leasing company was structured or how it came to contract with (employer), factors which have been somewhat pertinent in other cases to determining right of control. *See for example*, Texas Workers' Compensation Commission Appeal No. 931039, decided December 23, 1993. Perhaps a case could be made as to who maintained actual right of control. It is not to be made, however, on this contract alone.

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Susan M. Kelley
Appeals Judge