APPEAL NO. 931153

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly TEX. REV. CIV. STAT. ANN. Article 8308-1.01 *et seq.*). On November 19, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The major issue determined at the contested case hearing was whether claimant, DR, who is the appellant, was the employee of (hereinafter Labor) or (hereinafter Company), on his date of injury (date of injury), for purposes of workers' compensation insurance coverage. A secondary issue concerned the amount of claimant's average weekly wage. It was agreed that claimant had sustained a work-related injury on the premises of Company on the date of injury.

The hearing officer determined that claimant was the borrowed servant and employee of Company rather than Labor, and that the carrier for Company was liable for benefits. The hearing officer also determined that the claimant's correct average weekly wage was $85.19. Both Labor and Company were subscribers to workers' compensation insurance on the date of injury.

Notwithstanding the award of benefits, the claimant has appealed the determination of the hearing officer that he was the borrowed servant of Company, arguing that it was Labor that maintained the right of control over his activities. Claimant argues that he was an independent contractor with respect to Company. The average weekly wage determination was not appealed.

Both the carrier for Company and the carrier for Labor agree with the hearing officer's decision. Carrier for Labor further argues that because the two carriers entered into a benefit review conference agreement as to the identity of the employer for purposes of coverage, the hearing officer was bound by this agreement, and should not have heard any dispute over the matter.

DECISION

We affirm the hearing officer's decision.

The claimant stated that he was hired by Labor, for whom he had worked in the past, sometime in April 1993. He stated that assignments to other companies would be given when workers for Labor showed up at the labor hall. At the time of his injury, he had worked for Labor for eight days, but had been stationed at Company for three days. Claimant said his job at Company was to tie pallets together and move them with a forklift. Claimant wore safety clothing provided to him by Labor, but he stated that safety clothing provided by Labor would vary depending upon the job where he was sent to work. He recalled he had been asked, prior to going to Company, if he was able to drive a forklift. He did not recall that he was told at the labor hall what he would be doing for Company. Claimant believed that he was directed on his assignment "ticket" to report to Company's plant operator. He stated that the job at Company was supposed to be a "steady ticket" which would last a long time.

Claimant stated that there were no identified supervisors for Labor at Company's location, and he assumed that the decisions as to where to move the pallets were made by Company. Claimant said he was shown what to do by another Labor co-worker who had been working at Company. He agreed that if Company reassigned him to do something else, or directed him to leave, they could do it. Claimant agreed if Company had directed him to sweep the floor rather than work with the pallets, he would have done it.

Claimant was injured along with others when a tank at Company's location blew up. He said that he was driving a forklift at the time of the accident, and no one was giving him direction at that moment. Company signed his ticket at the end of each day's work, and indicated that he should return by checking "repeat" on that ticket. Claimant was paid by Labor.

(Mr. D), the general counsel for Labor, stated that claimant had been hired out to Company as general unskilled labor, and that as far as Labor was concerned, Company had supervisory responsibility over the claimant. He affirmed that there was no written agreement between Company and Labor. Mr. D said that Company had complete discretion to extend or shorten claimant's hours, and assign tasks, subject only to a restriction that he not drive a car or truck because Labor did not have insurance for these activities. Mr. D would not commit himself to an opinion as to whether claimant would be an employee of Labor while he was in the labor hall awaiting assignment. He presumed that claimant would have been covered by the workers' compensation insurance purchased by Labor.

(Mr. B), the operations manager for Company, said workers were obtained from Labor by a telephone call to its office. He stated that they had a standing requirement of what safety clothing Labor had to provide along with its workers, and that without this clothing they would not have permitted those persons to work at Company. He stated that claimant's immediate supervisor was (Mr. C); who was an employee of Company. Company owned the forklift driven by claimant as well as any other equipment used. Although he never personally supervised claimant, Mr. B stated he had the ultimate right of supervision.

Mr. C stated that he had not been working the first day claimant arrived at Company to work. He said, however, that he supervised and instructed claimant as to what he was to do. Part of Mr. C's job was to walk around the plant to watch work being performed and require corrections if necessary. Mr. C said that 30 minutes prior to the explosion, he corrected claimant's performance. Mr. C said he was not actually instructing claimant at the moment of the explosion, but that claimant was carrying out his work based upon previous instruction and direction. Mr. C considered that the operation of a forklift required some skill. He did not train claimant how to operate a forklift.

The adjuster for Labor's carrier stated that it initiated payment of compensation based upon Labor's report of injury, but that she began investigating whether claimant was a borrowed servant of Company after being contacted by Company's carrier.

Whether a person employed by one company has become the borrowed servant of another is ordinarily a question of fact. Sparger v. Worley Hospital Inc., 547 S.W.2d 582 (Tex. 1977). Even where there is a contract between two employers concerning employment of a worker, the trier of fact is not necessarily bound by recitations in a contract as to who is and who is not an employee, but may look to facts and circumstances surrounding a transaction to determine right of control. *See* Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964); Texas Workers' Compensation Commission Appeal No. 93053, decided March 1, 1993. Whether a worker is a borrowed servant is a matter of fact which may be ascertained from actual evidence as to who has the right of control. *See* Exxon Corp. v. Perez, 842 S.W.2d 629 (Tex. 1992); Denison v. Haeber Roofing Co., 767 S.W.2d 862 (Tex. App.-Corpus Christi 1989, no writ).

While claimant argues on appeal that he was carrying out the duties of his employment by Labor when he complied with direction from Company, the rebuttal to that argument can be found in the case of Carr v. Carroll Co., 646 S.W.2d 561 (Tex. App.-Dallas 1982, writ ref'd n.r.e.). In that case, the court held that control was not maintained by a labor services provider, (company)., merely through its general instructions to the workers it hired out, to perform tasks assigned by the company where they were sent. (We note further that this case responds to, and rejects another contention made by claimant: that he was required to consent to being a borrowed servant before such a relationship could be found). In Carr, as in this case, the worker was found to be injured in furtherance of the business of the company where he was located, rather than the business of the labor services company.

In the absence of a written agreement, including an agreement provided for in Section 406.123, the hearing officer was faced with evaluating the facts relating to right of control over claimant's work. Although claimant's attorney asked several questions about whether claimant was actively being supervised at the moment of the explosion, we do not regard this dispositive of the issue. The evidence clearly supports that it was Company, and not Labor, that controlled and directed the scope of claimant's daily activities, and within that, his discreet activity at the moment of injury. Safety clothing was provided by Labor, but clearly because of the requirements outlined by Company. Although claimant argued that forklift driving was a specialized skill (consistent with his theory that he was an independent contractor), the general counsel for Labor stated that claimant had been provided as unskilled labor.

Whether claimant was covered by Labor's workers' compensation insurance policy is not dispositive of the issue. *See* Archem Co. v. Austin Indemnity Inc., 804 S.W.2d 268, 270 (Tex. App.-Houston [1st Dist.] 1991, no writ); Marshall v. Toys-R-Us Nytex Inc., 825 S.W.2d 193 (Tex. App.-Houston [14th Dist.] 1992, writ denied). We would also point out that Section 409.021(c) makes clear that a carrier's right to later deny a claim is not affected if it initiates payment of compensation.

It is true that the carriers agreed at the benefit review conference that claimant was the borrowed servant of Company. Claimant did not sign this agreement. Although the carrier for Labor had stated that this agreement essentially resolved the issue of the

employer's identity, and also objected to going forward on this issue at the hearing, the matter has not been raised timely as a point of appeal, but is included only in the response. We will therefore observe generally that we cannot read Section 410.030 to bind a claimant to an agreement he did not sign.

We believe that the hearing officer's determination as to the identity of claimant's employer for purposes of worker's compensation is sufficiently supported by the record.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Thomas A. Knapp
Appeals Judge