APPEAL NO. 93647

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. arts. 401.001 *et seq*. (1989 Act). A contested case hearing was convened in (city), Texas, on May 3, 1993, and was continued until June 30th, upon which date the record closed. The hearing officer, (hearing officer), determined that the claimant at the time of his injury was the employee of (employer), and was not an employee of (employer). nor a borrowed servant of either (employer/employer). He also made findings of fact regarding the employer's workers' compensation carrier, although his decision says that "no determination is made concerning whether Hartford Underwriters Insurance Company is the workers' compensation insurance carrier for (employer), as alleged, because that issue was not before this contested case hearing," and his order says that "the workers' compensation carrier for (employer), if there is one," shall pay medical and income benefits to the claimant. In its appeal, Hartford Underwriters Insurance Company (hereinafter carrier) raises three points of error: that the hearing officer is limited to considering only the issue certified as unresolved at the benefit review conference; the hearing officer erred in making certain findings of fact concerning coverage; and that findings of fact concerning the claimant's employer, as they may relate to carrier's liability, are not supported by the evidence.

DECISION

We affirm the hearing officer's decision and order.

It was not in dispute that claimant suffered an injury when he was struck in the head by a vacuum hose which was being used to remove waste from a storage tank and which broke loose while operating under high pressure.

The claimant's position was that he was an employee of (PCI), an employee leasing company which had hired him and paid his salary. He said that (employer) (SCC), a company which performed cement operations, pumped waste into disposal wells, and did well pressure testing, had no employees of its own and leased all its workers, including the claimant, from PCI. Claimant was also a part owner of SCC. He said SCC leased its employees from PCI so that they would be covered through PCI's workers' compensation policy with carrier; SCC itself only carried general liability and automobile insurance. Claimant said he was lead man on SCC's crew, and said he had the authority to direct anybody that worked for SCC through PCI.

Claimant characterized himself as a cement operator who had 12 years' oil field experience, and said that he also did mud pumping and pressure testing. SCC had a continuing services contract with (employer) for cementing and disposal services. At the time of his injury, claimant was working on a job at (employer)'s (employer), cleaning out tanks and pumping waste into a disposal well. He had one helper, RG. The (employer) employees who ordered the work done were (Mr. H) and (Mr. T). Claimant said he only occasionally talked to these men, and that at the end of each day he prepared for them a

"wire report" detailing the day's work, but that they did not furnish any equipment, supervise him or direct his work in any way, impose deadlines, or tell him when to take lunch or breaks. He said he was hired (and had performed similar jobs for (employer) in the past) because (employer) did not have any employees with his skills. The equipment he used on the job belonged to SCC except for his own, personal pickup truck that was insured under SCC's automobile policy. He said that "the job paced itself."

The contract for continuing work and services between (employer) and SCC was made part of the record. The nature of the work was described as including, but not limited to, providing cementing services as requested by (employer). (An attached exhibit to the contract included charges for work and materials for "cementing and pumping services.") The contract provided that SCC was to be considered an independent contractor who controlled the detailed manner of doing the work, with (employer) "being interested only in the results obtained."

The contract also required SCC as contractor to carry and maintain workers' compensation insurance for its employees (including an endorsement stating that a claim against (employer) based on the doctrine of borrowed servant shall be treated as a claim arising under the contractor's policy). Made part of the record were certificates of insurance issued to SCC and (employer) listing carrier as the workers' compensation insurance carrier and PCI as insured. (A second certificate of insurance issued to (employer) showed SCC as the insured on general liability and automobile insurance policies issued by insurers other than carrier.) An unsigned and undated letter on PCI's letterhead addressed "To Whom It May Concern" states that SCC leases all its employees from PCI and that workers' compensation insurance is provided for those employees through PCI's policy.

Also at the job site were employees of (employer), which also had executed a continuing services contract with (employer) to vacuum out the tanks. As claimant described the relationship between the two entities, SCC was hired by (employer) to dispose of the fluid that (employer) vacuumed out, and "to help (employer) suck the fluids out of the tank." He said that this was pursuant to verbal instructions from (employer) and that there was no written work order to that effect.

Mr. H, (employer)'s field supervisor, testified that SCC and (employer) were independent contractors performing specialty services that (employer) did not have the equipment or employees to do. He described the difference between the vacuum services provided by (employer) and the disposal services provided by SCC by saying that (employer) had to pick up the fluid and take it to the truck in order for SCC to pump it into the disposal well; he noted that SCC did not have vacuum trucks and therefore could not provide vacuum services. He also said (employer) gave no directions or deadlines to SCC, that it only told them where the work was, inspected the job to see that it was being

done properly, and could shut the job down for safety violations. Mr. H said SCC invoiced (employer), who paid SCC for the work. It did not pay PCI, which Mr. H said he had heard of but did not know "who they are;" he said there was no contract between (employer) and PCI. Mr. T said the wire reports were necessary for (employer)'s record keeping requirements to the Railroad Commission concerning volumes disposed of.

Claimant's injury occurred as he was assisting (employer) employees with vacuuming material out of a tank which Mr. T said was 1/2 to 3/4 miles away from the disposal well into which claimant was pumping. In a transcription of a telephone conversation between claimant and carrier's adjuster, claimant said that although SCC's job was to pump, Mr. H "said for us while we were waiting to go over and help these guys." Both Mr. T and Mr. H denied telling claimant to assist (employer), although Mr. H said it did not surprise him that the SCC crew was helping the (employer) crew, and "it's been done before." (Mr. R), a vacuum truck driver for (employer), said that he had been increasing pressure in an attempt to unclog a hose when the hose flew out of claimant's hand and hit him in the face. Mr. R said claimant had been helping them with the job by holding the hose and telling him every time it got stopped up. Mr. R said he had not asked claimant for help and had not heard Mr. H tell claimant to help with the vacuuming. Claimant testified that it was a usual practice in the oil field to assist other individuals with work. Mr. R said he needed more help to do the job, although he said he did not tell Mr. H or Mr. T with (employer) that they needed more help because "most of the time we have someone. . .the rig hand or someone that will help us to do that. Whoever's out there, they always help us do that." He agreed that it was common practice for workers in the oil field to assist each other.

(Mr. F), a 50% owner of SCC who does bookkeeping, invoicing, and office management for SCC, but who stated he is an employee of PCI, testified that he could find no written contract between PCI and SCC, but that the two entities had an "understanding" by which PCI would provide personnel to SCC "as needed to perform the job and duties of [SCC]." He agreed that there was a contract between (employer) and SCC, but said that it only covered cementing, not pumping and not vacuuming. He said the claimant was an employee of PCI, and was issued a biweekly salary check by them. He said that because the (employer) contract required workers' compensation insurance, the certificates of insurance were sent to (employer) with a cover letter explaining the relationship between the two companies.

Basically, the hearing officer determined that the claimant was an employee of SCC at the time of his injury and that he was not an employee or borrowed servant of (employer), (employer), or PCI. In his discussion of the evidence, the hearing officer gave his reasoning as follows:

> Claimant was assisting the (employer) employees because he could not perform his job of pumping and cementing until (employer) completed its job of vacuuming. No one from (employer) asked him to help and no one from (employer) told him to help. . .Claimant totally controlled his activities and was not controlled by anyone from (employer).
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> It is clear from the evidence that SCC had the right of control over claimant at the time of his injury. SCC was performing work for (employer) under a contract for continuing work and services which specifically provided that the contractor (SCC) had the right to control details of the contractor's performance, with (employer) only providing the location, tasks to be performed, inspection, and acceptance or rejection of the finished contract work. (employer) did not provide any tools or machinery to SCC, and paid for services based on an invoice submitted by SCC.

In addition to findings and conclusions to support the foregoing, the hearing officer also made two findings of fact which have been challenged by the carrier:

FINDINGS OF FACT

> 25.According to the provisions of SCC's contract for continuing work and services with (employer), workers' compensation coverage for its employees was to be provided through PCI under contract with PCI and (employer).
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> 26.If finding of fact 23 (sic), above, is correct, then (Company) (sic) is the workers' compensation carrier for SCC.[1]

[1] (employer)'s workers' compensation insurance carrier, filed a request for correction of clerical error to correct this finding to read as follows: "If Finding of Fact 25, above, is correct, then Hartford Underwriters Insurance Company is the workers' compensation carrier for SCC." Carrier's appeal appears to presuppose that Finding of Fact 26 is stated per a corrected finding.

The carrier contends that these findings are erroneous as not supported by the evidence and insofar as they determine issues not properly before the hearing officer. The carrier contends that the only issue for consideration at the contested case hearing was that designated at the benefit review conference, namely, was the claimant a borrowed servant of (employer). The carrier says that the decision and order determines this issue, but that all other findings of the hearing officer are moot and not binding on the parties.

The record below reflects that, shortly after the hearing was convened, the original issue from the benefit review conference--whether claimant was a borrowed servant of (employer) at the time of his injury on (date)--was redefined upon agreement of all the parties to include the issue of whose employee claimant was, out of the four potential employers. The record further shows that claimant moved at the hearing to add the issue of, if he were determined to be an employee of SCC, whether or not he would have been covered under PCI's workers' compensation insurance policy. Claimant basically advanced a judicial economy argument to support the existence of good cause for addition of this issue. In denying claimant's motion, based on lack of unanimous consent by the parties, the hearing officer made clear that this issue was not foreclosed and that "if it should become an issue at a later time, it would need to go through the proper dispute resolution procedures of the Commission then."

We find that the hearing officer's decision and order are consistent with this ruling. His decision states, in pertinent part, "Claimant is entitled to medical and income benefits from the workers' compensation carrier for [SCC]. No determination is made concerning whether [carrier] is the workers' compensation carrier for [SCC], as alleged, because that issue was not before this contested case hearing, and the parties did not address that issue at the contested case hearing." Likewise, his order stated in part, "The workers' compensation carrier for [SCC], if there is one, is ordered to provide medical and income benefits to claimant in accordance with this decision, the Texas Workers' Compensation Act, and the Commission's rules."

While this result will no doubt require further resolution of the issue of coverage, we cannot say it was error under the facts of this case where that issue was neither litigated nor before the hearing officer for decision. We also observe that the carrier cites approvingly the hearing officer's statement but no determination was being made concerning whether carrier is the workers' compensation carrier for SCC. To the extent that Findings of Fact Nos. 25 and 26 are inconsistent with the decision and order and unnecessary to resolution of the issue at the hearing, they will be considered surplusage and may be disregarded. Texas Workers' Compensation Commission Appeal No. 92135, decided May 18, 1992.

The carrier also argues that the hearing officer's findings concerning claimant's

employer, insofar as they may relate to the liability, if any, of carrier, are not supported by the evidence. Carrier does not specify which of the findings of fact, other than those mentioned above, are challenged, although it appears to argue that any findings and conclusions that go beyond the issue of whether the claimant was a borrowed servant of (employer) are outside the scope of the hearing. For the reasons detailed above, the issue was properly expanded to include the nature of claimant's relationship with any of four potential employers. For that reason, the hearing officer was entitled to make findings that were not limited merely to whether the claimant was (employer)'s borrowed servant.

Finally, the carrier alleges that "there is no evidence or insufficient evidence to support the findings of facts and conclusions of law made by the. . .hearing officer as reflected in the Decision and Order entered in this case." It is questionable whether this statement "clearly and concisely rebut[s] or support[s] the decision of the hearing officer on each issue on which review is sought" pursuant to the requirements of Section 410.202(c), especially in a decision with 26 findings of fact and 6 conclusions of law. However, our review of the record reveals sufficient evidence to support the hearing officer's decision. Whether an individual is an employee depends upon whether the purported employer has the right to control the individual in the details of the work to be performed. Texas Employers Insurance Association v. Bewley, 560 S.W.2d 147 (Tex. Civ. App.-Houston [1st. Dist.] 1977, no writ). The relationship between the parties can be set forth in a contract, so long as the contract expressly determines the issue of right of control. Archem Company v. Austin Industrial, Inc., 804 S.W.2d 268 (Tex. App.-Houston [1st. Dist.] 1991, no writ); Magnolia Petroleum Company v. Francis, 169 S.W.2d 286 (Tex. Civ. App.-Beaumont 1943, writ ref'd). Where there is no contract, the employer-employee relationship may be determined circumstantially by evidence of actual exercise of control. INA of Texas v. Torres, 808 S.W.2d 291 (Tex. App.-Houston [1st Dist.] 1991, no writ). Texas courts have listed indicia of control in determining employment status; for example, it has been held that a person who performs work requiring a special skill, furnishes all his own tools, is working according to a predetermined plan, who can come and go from work within his discretion, is paid by the job, and who is not carried on payroll, social security or income withholding rolls of another, may be an independent contractor for purposes of workers' compensation. Anchor Casualty v. Hartsfield, 390 S.W.2d 469 (Tex. 1965). In addition, a general employee of one employer may become the borrowed servant, or special employee, of another. Sparger v. Worley Hospital, Inc., 547 S.W.2d 582 (Tex. 1977). The essential question in that determination, as with the employer-employee relationship in general, is who has the right to control the details and manner of the work; if the employee is placed under another employer's control in the manner of performing services, the employee becomes the borrowed servant of that employer. Producers Chemical Co. v. McKay, 366 S.W.2d 220 (Tex. 1963). Applying the foregoing principles of law to the evidence in this case, we believe there is sufficient evidence in the record to support for the hearing officer's findings that the claimant was the employee of SCC and

was not the employee of PCI or the borrowed servant of (employer) or (employer). Probative evidence included the lack of a written contract between PCI and SCC, the limited extent of claimant's relationship with PCI versus the right of control vested in SCC pursuant to the written contract between (employer) and SCC, and the lack of control exercised by (employer) and (employer). To the extent that any evidence was in conflict, that was a matter for the hearing officer to resolve. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied).

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge