APPEAL NO. 93733

On May 17, July 13, and July 15, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issue involved the identity of the claimant's employer on his date of injury. The hearing officer found that the appellant (claimant), the claimant herein, was injured in the course and scope of his employment on (date of injury), as an employee of (hereinafter Leasing Company), and that he was not an employee or borrowed servant of (Company G), a landscaping company, on this date. The hearing officer determined, as basis for this, that the contract between Leasing Company and Company G did not govern right of control, and that in actual day-to-day operation the claimant was supervised by other employees of the Leasing Company.

The claimant appeals the hearing officer's determinations that he was injured while an employee of Leasing Company, and that he was not a borrowed servant or employee of Company G at the time of his injury. Claimant asserts that he did not know about the arrangement and consequently is not bound by it. The claimant also argues that the hearing officer's reasoning is faulty to the extent that she determined that because individual supervisors of the claimant were nominal employees of Leasing Company, that claimant was not a borrowed servant, and argues that the proper inquiry is whether the entity of Company G still maintained right of control. Claimant argues that the hearing officer erred by not finding that the contract vested right of control over the work of claimant in Company G. Claimant argues that the arrangement was a sham and that nothing about the job actually changed although claimant was argued to be the employee not just of Leasing Company, but a predecessor company that it was argued also "leased" claimant to Company G. The carrier responds that the decision of the hearing officer should be upheld.

DECISION

We reverse the decision of the hearing officer, and render a decision that the carrier is liable for workers' compensation benefits to the claimant, holding that the hearing officer erred in concluding that claimant was not acting as a borrowed servant of Company G at the time of his injury. We hold that such finding of the hearing officer is against the great weight and preponderance of the evidence. We further hold that Company G, not Leasing Company, had the right to control the work of claimant at the time of his injury.

Claimant had been employed as a laborer by Company G, a landscaping company, for about five years before his injury on (date of injury). He was injured when he slipped while operating a weed eater, on the premises of one of Company G's customers. The president and owner of Company G was (Mr. S), whom claimant identified as the person who first hired him to work for Company G. Claimant neither spoke nor read English. He stated that as part of his compensation, he was permitted to rent a house, and that the rent was deducted from his pay.

Claimant testified that on November 26, 1990, first thing in the morning, employees were called to a meeting that lasted no more than fifteen minutes. Mr. S was at this meeting as well as a man named (Mr. B), whom he understood was with Leasing Company. He

stated that all were directed to fill out a new application but told that nothing would change. Claimant did agree that something was said about being employees of Leasing Company. He understood that Leasing Company could sell them insurance, and he applied for disability insurance. The claimant said that his impression both before and after the meeting was that he would continue to be a Company G employee. He stated that nothing was explained to the employees about any changes in workers' compensation or supervision.

Claimant said that on a day-to-day basis, he would come to Company G's premises, and receive directions for the day as to where the work would be done. These directions were received from "S", who he stated was directed by Mr. S (the son of the company owner). This was the procedure he followed on his date of injury. He stated that after his injury, (Mr. R), a supervisor, directed him to a van, and he was taken to Company G headquarters where "S" filled out a report in order for him to go to the hospital. Claimant's wife took him to the hospital. Although his first doctor gave him a light duty release to work for 15 days after the injury, the claimant said that his treating physician, RH, took him off work because he had two bad discs in his back.

Claimant stated that he wore a Company G uniform. He was supplied with various tools and machines to perform his job by Company G. Claimant said that his paychecks started coming with the name of Leasing Company printed on them, but indicated that previously his checks had listed other names as well. Claimant said that checks were handed out by Company G every Friday. He stated that he understood "S" to be employed by Company G.

A document entitled "Conditions of Employment" with Leasing Company, dated November 26, 1990, was identified as a document claimant signed at the meeting. An "Application for Employment" was also filled out on this date but contains no information about claimant's educational background or work history. The Conditions of Employment indicate that the employee agrees to enter into a employer/employee relationship with Leasing Company and that he understands he cannot be laid off or fired by anyone but the termination officer at Leasing Company's headquarters. The document further indicated that "the employee" will be assigned to Company G, but that if Company G indicated his services are no longer needed there, he should report for further work assignment to Leasing Company within 48 hours. A brief Spanish statement above the signature line was not very clearly translated on the record; however, it indicates a certification that the document had been explained to claimant by someone he confided in. The claimant stated, however, that he did not read this statement before he signed the document, that it was not explained to him in Spanish, and that he did not understand that he could be sent to work at any company other than Company G.

Claimant stated that after this accident, he had a conversation with Mr. S in which Mr. S questioned why he had gotten an attorney, when everything could have been resolved between them. He stated that Mr. S visited him about two or three times after his injury.

He stated that he initially pursued a claim against Leasing Company.

Mr. S, the owner of Company G for 19 years, stated that around January 1990, due to the Texas recession, his company was in worsening financial condition and could not afford benefits he wished to provide to Company G employees. He stated that Company G and other companies then contracted with Leasing Company to provide a pool of labor to various contractors in the (city) area. At a time he did not specify, Mr. S indicated that his employees (of which claimant and "(S)" were two) became employees of Leasing, by filling out applications and completing letters of resignation from Company G.

Mr. S testified that (employer) was not able to keep up the arrangement due to its own bad financial condition. Mr. S stated that (employer) (and not he) referred and negotiated with Leasing Company to take over its leasing services to Company G and other companies. When questioned about the November 26, 1990, meeting, Mr. S initially testified that it was held with "former employees" of (employer). He later stated that at the time of the meeting, claimant and other persons at the meeting were (employer) employees, not employees of Company G.[1]

Mr. S was willing to acknowledge that the signature on a November 9, 1990, Subscriber Service Agreement with Leasing Company appeared to be his, but could not say for certain that the agreement was a copy of the one he signed. The agreement's effective date was December 1, 1990, which Mr. S testified would be the date that Leasing would go out of business. Mr. S strongly insisted that the arrangement with Leasing Company (which he characterized as a transfer from (employer) to Leasing Company) was fully explained, in English and Spanish, to the persons in attendance. He stated that the aspect of the benefits that Leasing Company would be able to provide was an important point. Mr. S said that while it was indicated that employees would continue to receive paychecks on a weekly basis as before, that it was explained that Leasing Company would be the employer. Mr. S stated that his motivations in entering into leasing arrangements were that employees would remain employed, that the new company could offer benefits he could not afford, and that it would reduce the cost of his administration. Mr. S stated that accounting and management staff (including himself and Mr. S) remained as employees of Company G, but that all supervisors were transferred to Leasing Company.

Mr. S stated that he would contact Leasing Company about how many employees he would need to perform a customer job and they would send out that number. In answer to more questions, Mr. S indicated that such contact usually was made through Leasing Company's supervisors at his job site, one of whom was (S) . Mr. S stated that it was voluntary for the (employer) employees at the November 26, 1990, meeting to apply to

[1]The hearing officer found that Company G and Leasing dissolved their agreement and that Company G began negotiating a similar agreement with Leasing Company.

Leasing Company, but that they were informed that (employer) would be going out of business. He could not recall if any (employer) employees elected not to apply to Leasing Company.

Mr. S's impression of the arrangement with Leasing Company was stated thusly:

We would have only top management, control the contracts and the clients. They would provide mainly all the employees and the supervisors.

Mr. S described his role:

My direction was to the supervisor, the [Leasing Company] supervisor, that this is the results we need, this is the quality of work we expect and this is the timeliness. . ." and that it was up to the supervisors to run the employees.

Mr. S asserted that he did not perform day-to-day supervision. He stated that on occasion, he had to obtain other persons to perform the jobs through (city) Temporaries or an unspecified contract labor service. He supplied uniforms to all persons at his customers' insistence that "our employees" be uniformed, although he stated that claimant had purchased his uniform. Mr S supplied the tools. Mr. S stated that working hours and tasks were for the most part dictated by the customers. Mr. S stated that a copy of a January 5, 1991 agreement that he signed with Leasing Company was not explained or transmitted to the claimant.

Mr. S acknowledged that he heard about claimant's injury from (S) and became concerned, primarily, he said, because he rented a house to claimant (at a time when claimant was an (employer) Leasing employee) and was concerned about rent money. Mr. S stated that his office became aware (the source was not specified) that claimant had been released for light duty, that they offered light duty through Leasing Company, and that Mr. S became concerned when claimant did not show up for light duty. He agreed that he visited him a few times, and expressed his "disappointment" to claimant over his hiring of an attorney.

Mr. S acknowledged that (S) and other supervisors of claimant had been hired first by Company G, then subsequently transferred to (employer) Leasing and then Leasing Company. He stated that it was up to them to supervise the employees, but that they had learned the business operations from him while employees of Company G. Mr. S said that he definitely understood that Leasing Company would provide workers' compensation insurance, and notices were posted to this effect.

Mr. B testified that he had been the risk manager for Leasing Company. He stated that he did not attend the November 26, 1990 meeting at Company G, but generally testified as to his understanding of what was usually discussed at such meetings. He acknowledged that Leasing Company did not conduct a background check of job applicants

from the November 25, 1990, meeting, but would do so for a subscriber "if they want to hire somebody else new." He understood that if Company G had a problem with performance of individual employees, that it would tell the supervisors. He testified that Company G would give direction to leased employees through on-site supervisors, and it was supervisors "out there" that controlled day-to-day operations.[2]

The agreement between Leasing Company and Company G, executed November 5, 1990, says that Leasing Company will provide leased employees and related services to Company G. Leasing Company is to "administer" the workers compensation program and claims, as well as vacation, wages and payroll deductions and taxes. Leasing Company agreed to conduct an orientation with "existing personnel" of Company G to explain "their discharge" from Company G and new employment with Leasing Company. Company's G's duties under the contract include:

> D.Provide, if requested, on-site supervisory services at no cost to [Leasing Company] with respect to the personnel assigned to subscriber and to oversee employee work and work product, provided, however, that no such supervision, control, or discipline shall affect or diminish the employer-employee relationship between [Leasing Company] and personnel and subscriber shall do no act in contravention thereof.
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> E.Be responsible for the work and work product or personnel assigned to subscriber and to be responsible for all claims arising therefrom and to discharge and indemnify [Leasing Company] with respect to any liability therefrom.

The agreement further provides that Company G shall not terminate employees but will consult with Leasing Company with respect to discharge or any performance problems, to maintain liability and auto insurance naming Leasing Company as an additional insured, to hire or rehire all personnel (at Leasing Company's option) if the agreement with Leasing Company is terminated.

The January 5, 1991, agreement contains provisions similar to these, as well as additional provisions naming Leasing Company as the "sole employer." Provision "D" cited above has been deleted under the duties of Company G, although a provision similar to "E" is retained. The January agreement contains a new provision that Leasing Company may designate on-site supervisors from among the leased employees, and provides that these persons are under the direct supervision of Leasing Company. The agreement provides that Company G shall make all "non-routine" directives through the on-site supervisors.

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[2] One piece of evidence admitted over objection by the carrier was a memorandum from claimant's attorney's paralegal that cited statements allegedly made by Leasing Company's sales agent, to the effect that Leasing Company was employer on paper only. The hearing officer apparently gave scant weight to such double hearsay and we agree.

The agreement repeats indemnity provisions. Mr. S on the same day also signed an indemnity agreement whereby Company G agreed to indemnify Leasing Company of any claims relating to operation arising out of the use of its vehicles.

On August 30, 1990, claimant signed an agreement to pay Mr. S $30.00 per week for his house, and gave permission "to any person authorized by [Company G]" to deduct from his paycheck any utilities or unpaid rental.

On March 5, 1993, Ms. G, the office manager for Company G, wrote to Leasing Company indicating surprise at claimant's reported contention that the arrangement had not been explained to him. The letter stated: "the leasing program was explained to all of the people who worked for [Company G]."

The evidence indicated that Leasing Company undertook to provide workers' compensation insurance through a company not licensed to sell insurance in Texas. This company was enjoined in December 1992 from selling insurance without the proper authority. The parties stipulated that this company had disputed claimant's first claim on the basis that he was not injured in the course and scope of employment, and that this defense was not based upon an assertion that claimant was not a leasing company employee.

The carrier's assertion that the claimant was Leasing Company's employee begs the question of whether he, at the time of his injury, was also a "borrowed servant" of its insured, Company G. We have many times before cited the numerous Texas cases that stand for the doctrine that an employee of a general employer may become the borrowed servant of another. Sparger v. Worley Hospital, Inc., 547 S.W.2d 582 (Tex. 1977). We would further note that the borrowed servant doctrine protects the employer who had the right of control over the manner and details of the employee's work from common-law liability. Carr v. Carroll, 646 S.W.2d 561, 563 (Tex. App.-Dallas 1982, writ ref'd n.r.e.). To determine whether or not an injured worker has become a borrowed servant, the question is which company has the right to control the activities of the servant. In determining this fact, it is necessary to examine evidence not only as to the terms of the contract, but also evidence with respect to who exercised control, or such evidence that is relevant as tending to prove what the contract really contemplated. Halliburton v. Texas Indemnity Insurance Company, 213 S.W.2d 677, 680 (Tex 1948). The normal scope of business of the general employer and that of the special employer may be considered to determine the issue of "borrowed servant." Carr v. Carroll, *supra* at 564. Even in the case of a written contract, the trier of fact can consider other evidence to determine whether the contract is a sham or has been abandoned, *see* Newspapers Inc. v. Love, 380 S.W.2d 582 (Tex. 1964), or where the contract doesn't clearly speak to the right of control. Archem Company v. (city) Industrial Inc., 804 S.W.2d 268 (Tex. Civ. App.-Houston [1st Dist] 1991, no writ). While the court will look to any express contract, it need not be merely concerned with form over substance. Kemp v. Frozen Food Express, 618 F. Supp. 431 (E.D. Tx 1985). Issuance of paychecks and withholding of taxes is not conclusive of employee status. Mayo v. Southern Farm

Bureau Casualty Co., 688 S.W.2d 241 (Tex. Civ. App.-Amarillo 1985, writ ref'd n.r.e.).

In addition to common law provisions relating to borrowed servant, we would observe that the 1989 Act, under former Art. 8308-3.05 (recodified as TEX. LAB. CODE ANN. §§ 406.121 - 406.127) provides a means by which a general contractor and a subcontractor can, for purposes of workers' compensation insurance, agree to have the subcontractor assume the responsibilities of an employer for performance of work. Section 406.122(b) indicates that an employee of a subcontractor who performs service for a general contractor will generally be considered the employee of the general contractor unless the subcontractor operates as an independent contractor and has entered into the requisite written agreement.[3] Section 406.121(2) states that "independent contractor" means:

> . . . a person who contracts to perform work or provide a service for the benefit of another and who ordinarily:
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> (A)acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;
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> (B)is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employer;
>
> (C)is required to furnish or to have employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and
>
> (D)possesses the skills required for the specific work or service.

We agree with the claimant that the hearing officer erred by focusing her analysis on whether the claimant's first tier supervisors were "employees" of Leasing Company, as opposed to whether Company G as an entity maintained, and exercised, right of control over claimant. There is every indicia that the supervisors were themselves "borrowed servants." The business performed by claimant was that of Company G, landscaping. Claimant had been hired by Company G well before Leasing Company was involved. Mr. S stated not once but at least twice that he gave direction to supervisors, who, although "employees" of Leasing Company, had been hired by Company G and had learned business operations from Mr. S. The directions given by Mr. S were the demands of Company G's customers, as to hours and work to be performed. Mr. S supplied the tools to accomplish the job, and, in many cases, uniforms. Mr. S testified that many of his considerations in contracting with

[3] Section 406.124 states that if a person who has workers' compensation insurance coverage subcontracts all or part of the work to be performed to a subcontractor "with the intent to avoid liability as an employer under this subtitle," then an employee of the subcontractor who sustains a compensable injury shall be treated as an employee of the person, with a separate right of action against the subcontractor.

the Leasing Company had to do with holding down his costs, or furnishing benefits he would not otherwise provide. We have applied the "borrowed servant" doctrine in situations where the connection between the injured worker and the "borrowing company" were not as longstanding as here. *See* Texas Workers' Compensation Commission Appeal No. 93053, decided March 1, 1993; Appeal No. 92188, decided June 29, 1992.

To the extent that Sections 406.121 and 406.122 offer guidance, it appears clear that Leasing Company did not operate as an independent contractor according to the definition in Section 406.121(2). Therefore, under the provisions of Section 406.122, as well as borrowed servant analysis, Company G is the "employer" of claimant for purposes of workers' compensation.

Because of our holding on the right of control issue, we render a decision that claimant was, at the time of his injury, a borrowed servant of Company G, acting within the course and scope of employment as such, and the hearing officer's findings and conclusions to the contrary are against the great weight and preponderance of the evidence. While we observe that claimant could also be alternatively considered as an "employee" of Company G under operation of Section 406.122, we need not so hold.

We reverse the decision of the hearing officer, and render a decision that claimant sustained a compensable injury while acting as a borrowed servant of Company G and while acting in the course and scope of his employment as a borrowed servant, and that respondent is ordered to pay all medical and income benefits arising as a result of such injury, subject to credit for any income benefits already paid pursuant to interlocutory order of the Commission, until claimant reaches maximum medical improvement or no longer has disability.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge