APPEAL NO. 94140

Pursuant to Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) a contested case hearing was held in (city), Texas, on November 10, 1993, and January 3, 1994, with (hearing officer) presiding. The issues involved the identity of the claimant's employer on his date of injury, whether the claimant sustained a compensable injury on (date of injury), and whether he had disability (the inability to obtain and retain employment at his pre-injury wage) as a result of such injury. The hearing officer found that the appellant PB, the claimant herein, injured his back in the course and scope of his employment on (date of injury), and was unable to obtain and retain employment because of such injury, beginning May 17, 1993. However, the hearing officer determined that claimant was employed by (employer) (Leasing Company), a nonsubscriber to workers' compensation insurance, and that the injury was therefore not compensable, and carrier was not liable. She further concluded that claimant was not a borrowed servant for (employer). (Construction Company), the carrier's insured, on the date of his injury.

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 Construction Company at the time of his injury. Claimant asserts that previous Appeals Panel decisions have ruled differently based upon "identical facts." Claimant recounts the evidence it feels is in favor of a borrowed servant relationship. The carrier responds that the decision of the hearing officer should be upheld.

DECISION

As the great weight and preponderance of the evidence in this record is not against the determination of the hearing officer, we affirm.

Because the hearing officer's findings that claimant was injured while working on (date of injury), and that he could not obtain and retain employment because of this injury were not appealed, the summary of evidence will focus on the appealed issue of the identity of claimant's employer for purposes of workers' compensation coverage.

The claimant, who stated that he had worked for Construction Company at an earlier time, testified that he applied for a job in 1992 at the offices of Construction Company. The date was later pinpointed as June 22, 1992. The claimant stated that he got the application at the office from his uncle, (Mr. R), who had worked for Construction Company for a few years. He said that Mr. R told him he would be working for Construction Company. Claimant said that his first job, the next day, was working at the home of "Mr. W" whom he understood to be the employer of (Mr. F), who was head of Construction Company. Claimant submitted a copy of a business card he said Mr. R gave him. This card prominently features the name and logo of Construction Company; in smaller case lettering, it says, "[Mr. R], field supervisor."

On June 22, 1992, claimant signed an application for employment, a federal "W-4" tax form, an employment eligibility verification, and a waiver of confidentiality for prior

workers' compensation claims history. Only the last document indicated the name of Leasing Company, and then it was listed as the address for sending prior claims history information. At some point, claimant signed an employment card, which had the name of Leasing Company printed at the top, but indicated that claimant was a "rehire" as opposed to a new hire. Claimant said he signed these documents and did not really take note at the time of company names (if any) on them.

Also in evidence was a memo sent to "[a]ll [Leasing Company] employees" on April 13, 1992, which claimant agreed he had received. To briefly condense lengthy testimony from other witnesses, documents show that claimant was paid by Leasing Company, which also withheld income taxes and paid Texas unemployment taxes for him. Leasing Company also paid wages of all persons claimant identified as in his supervisory chain of command, up to and including Mr. R.

Claimant injured his back while working at an (X Co.) job site. Claimant stated that he was supervised at the X Co. job site by a (Mr. E) and (Mr. A), and that he understood that Mr. R supervised them. He reported his injury to Mr. A. Claimant stated that the various tools and machines he used to perform work were provided by Construction Company. He stated that its logo was on the side of trucks and backhoes provided to workers. Claimant's medical records from right after his injury to shortly before the hearing list his employer as Construction Company.

Claimant stated he understood he was employed by Construction Company, and he thought the name of Leasing Company appeared on his paycheck because it was a payroll company. Carrier offered, as impeachment, a copy of an unsworn amended petition filed in federal district court by claimant on November 10, 1993, seeking damages for personal injuries on (date of injury). It pleads that Leasing Company was claimant's employer and retained exclusive right of control over him. Defendants named are both Leasing Company and Construction Company. (This action was the apparent basis for numerous objections by the carrier that claimant was "doing discovery" by asking questions relating to the relationship between Leasing Company and Construction Company.)

Mr. F testified that he was the president of Construction Company. He stated that he had served in this capacity since 1988. He stated that he had administrative, financial, and cost control responsibilities. He identified his father as the chief executive officer of the company.

When asked who had negotiated the contract for services with X Co., Mr. F answered "no one." He later stated that Construction Company submitted a proposal to X Co. and was awarded the job. He testified that he wasn't involved enough with the project thereafter to know what happened. He stated that somebody else at Construction Company would have been, but could not say who that would have been. He agreed, however, that client company was looking to Construction Company for completion of the contract. He stated his understanding that the project involved dirt work, laying concrete, and putting in new pipes.

Mr. F, who signed the April 1, 1992 contract with Leasing Company, was unable to state what kind of a company Leasing Company was, even though provided the opportunity to refresh his recollection from the contract. He stated that he was not able to state that Leasing Company was only involved with employee leasing. Mr. F said that Leasing Company was a subcontractor to him for purposes of doing construction work, and that he had a standing contract with Leasing Company that would cover the work done for X Co. He stated that X Co. did not ask him to identify Construction Company's subcontractors. Mr. F said that his company's bid to X Co. did not state that Leasing Company would be used.

Copies of the proposal to X Co., or any contract with X Co. that would have been in effect on (date of injury), were not introduced into evidence. Mr. F stated that no one at Construction Company was particularly assigned to implement the contract with X Co. He stated that if there were any problems, X Co. would have called him (but did not on this project). He stated that he signed contracts for Construction Company. Mr. F said as far as he was concerned, there was nothing to "implement" on the X Co. contract.

Mr. F stated that on (date of injury), Construction Company had no employees at the X Co. job site. When asked how many employees Construction Company had, he stated that he couldn't be exact, but probably about five. He assumed it would have been about the same on (date of injury).

When asked if he had spoken to claimant since his injury, Mr. F responded that he could not recall "at this time." Claimant, however, recalled that Mr. F called him on the telephone, asked him to come to his office the next day, and that in his office he offered him his job back, and back pay, if he would drop his lawsuit. When claimant replied he would need to consult with his attorney, Mr. F said he didn't want an attorney involved and said he would contact claimant in a couple of days but never did.

Mr. F testified that the president of Leasing Company was a former employee of Construction Company, (Mr. FN). He stated that he believed that Mr. FN had worked for Construction Company from 1980-81 until he started Leasing Company. He did not recall "off hand" whose idea it was to start Leasing Company. He stated he did not know who Leasing Company's officers or board of directors were. Mr. F stated that he would have to go back and look at records to say how many employees of Construction Company became employed by Leasing Company, but did not know "at this time" if any had. Mr. F said that Mr. FN ran Leasing Company from his own offices; he stated that he also paid Mr. FN to do purchasing for Construction Company. There was no evidence as to whether Mr. FN was paid as a subcontractor or as an employee for such services. Mr. F stated that there were other employees of Leasing Company who maintained offices at Construction Company, such as (Mr. S), his cousin.

(Mr. SM), human resources director for Leasing Company, said it was incorporated February 28, 1992. He stated that Leasing Company had a separate corporate office, and satellite offices at the headquarters of its larger customers, which included Construction

Company. He stated that Mr. S was the Leasing Company employee in charge of this satellite office, and that Mr. R was the Leasing Company employee who scheduled its employees to perform Construction Company's contracts. He said that Leasing Company was not a subscriber but maintained an ERISA plan, which had paid claimant 75% of his wage during lost time, through June 14, 1993, the date his doctor released him back to work, and had also paid for medical bills through this date of release. Mr. SM said there were no identical officers or directors of Leasing Company and Construction Company. Mr. SM said Leasing Company was in the employee leasing business, supplying customers with skilled labor. He named one other customer but could not recall the names of others. He said that he had much experience himself in construction. When asked why claimant's employment card indicated he was a "rehire," and whether this meant he had been employed previously by Leasing Company, Mr. SM said he couldn't honestly answer the question with the information he had with him right now. Mr. SM insisted that Mr. F did not control hiring and firing of any Leasing Company employee. He indicated that his agreement with Mr. F was that if Leasing Company employees were unsatisfactory, then Mr. F could hire people to complete the job and charge Leasing Company for it; he conceded that this provision was not in the "written" contract of April 1, 1992.

Mr. A said he was claimant's supervisor at the work site, and an employee of Leasing Company, which evidence shows paid his wage and federal withholding taxes. Mr. A said his business card had the Construction Company logo on it. He said that this meant only that he represented Construction Company, not that he was employed by them. He had not been a Construction Company employee prior to coming to work for Leasing Company. He said it was very customary in the business for a general contractor to inform its customer about the identity of all its subcontractors.

An affidavit from RM the safety supervisor for X Co. in 1993, states that he had no recollection of Leasing Company having done any work at the job site where claimant was injured, and that the company working there was Construction Company, according to his recollection.

There was evidence regarding work done by Construction Company for Company, but it was somewhat cumulative of evidence claimant presented on the point of whether Leasing Company was disclosed as an employer of persons at the work site.

The agreement between Leasing Company and Construction Company, executed April 1, 1992, says that Leasing Company will provide leased employees and related services to Construction Company. It provides that Leasing Company shall have the right of control over all leased employees:

> Right of control shall include, but not limited to, daily supervision, work hours, manner of work performed by employees, and terms of employment so long as the terms of employment are consistent with this Agreement.

The agreement also provides that Leasing Company is the employer for purposes of

all workers' compensation claims, and that it "shall provide for all employees as required by Texas Employment Law as defined by the Texas Workers' Compensation Act . . . ." The lease refers to a schedule listing the employees covered by the agreement, and states that it may be updated monthly. (The attached schedule is dated July 2, 1992, however, and, although it could not have been part of the original April 1, 1992, contract document, was entered into the record by the claimant without objection.) The agreement is for a term of a year and is automatically renewable for yearly periods unless terminated. (We cannot agree with claimant's argument that the facts here are "identical" to those in Texas Workers' Compensation Commission Appeal No. 92498, decided November 3, 1992, because the contract provisions in that case were different.)

Whether or not claimant was the nominal employee of Leasing Company does not entirely resolve the issue of carrier's liability. 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, and that this is a question of fact. 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. Goodnight v. Zurich Insurance Co., 416 S.W.2d 626 (Tex. Civ. App.- Dallas 1967, writ ref'd n.r.e.). 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, 147 Tex. 133, 213 S.W.2d 677, 680 (1948). The trier of fact may consider whether the contract provisions were enforced, and a contract which delegates right of control is not conclusive where the evidence indicates it was not followed. Exxon Corp. v. Perez, 842 S.W.2d 629 (Tex. 1992). 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. 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. Austin Industrial, Inc., 804 S.W.2d 268 (Tex. App.-Houston [1st Dist.] 1991, no writ). Issuance of paychecks and withholding of taxes are 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.). However, the general supervision a general contractor exercises over a subcontractor to see that work is done in accordance with a contract does not constitute evidence of an employer-employee relationship between the general and the "sub." U.S. Fidelity & Guaranty Co. v. Goodson, 568 S.W.2d 443 (Tex. Civ. App.-Texarkana 1978, writ ref'd n.r.e.).

In addition to common law provisions relating to borrowed servant, we would observe that the 1989 Act, Sections 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 not be considered the employee of the general contractor if the subcontractor operates as an independent contractor and has entered into the a written agreement assuming the responsibilities of an employer. Section 406.121(2) defines the elements of independent contractor for purposes of the statute.[1]

We have indicated before that the mere fact that a labor services company names job site supervisors as its own employees does not foreclose a borrowed servant relationship, since facts may exist showing that such on-site supervisors are themselves borrowed servants. *See* Texas Workers' Compensation Commission 93733, decided September 20, 1993. However, in this case, there was frankly not much evidence elicited to controvert Leasing Company's proof that on-site supervisors were also its employees, and that day-to-day supervision of claimant's work was done by them. There is no contract between Construction Company and X Co. in evidence which would indicate Construction Company's representations to its customer about how supervision would be performed, or how the project would be managed. Mr. F testified that his only role would have been to resolve complaints, and there were none. His credibility on matters relating to contract oversight by Construction Company was for the hearing officer to judge. Mr. A stated that he was an employee of Leasing Company and had never been an employee of Construction Company. The extent of supervision required for claimant's tasks was not described.[2]

There is no evidence in the record, as to how or why the contract between Leasing Company and Construction Company came about, for the trier of fact to assess whether Section 406.124 would apply. (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.) Such evidence, along with information that claimant did seek to develop about any interlocking officers or directors, is relevant to whether a contract is a sham or inaccurately reflects an understanding as to right of control. *Compare* Texas Workers' Compensation Commission Appeal No. 931036, decided December 27, 1993.

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[1]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: (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; (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 employee; (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."

[2]The situation here, where a worker is left without coverage because of the leasing arrangement, may have been rectified by legislation effective September 1, 1993, which makes a leasing company and its client co-employers for workers' compensation insurance purposes. Staff Leasing Services Act, Ch. 994 § 11, 1993 Tex. Sess. Law Serv. 4349 at 4354 (Vernon).

A strong piece of evidence against claimant's case is the petition filed in the federal lawsuit, contending not only that Leasing Company was the statutory employer but that it had exclusive right of control. The latter contention forecloses a theory of borrowed servant. While we agree that a party may plead alternative theories of recovery, the theories pleaded by claimant in his lawsuit and in the proceeding before our agency are contradictory theories. The hearing officer could not be faulted for considering such to be at odds with claimant's position at the hearing.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). As we have stated many times, we will not substitute our judgment for that of the trier of fact because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Given the record in this case, we cannot agree that a great weight is presented against the findings and conclusions of the hearing officer.

Accordingly, the decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge