APPEAL NO. 962625
FILED FEBRUARY 7, 1997

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 21, 1996, a contested case hearing (CCH) was held. The issues at the CCH were whether the appellant, _____, who is the claimant, sustained a compensable injury in the course and scope of employment on _____; whether he had disability; the amount of his average weekly wage (AWW); and "was [Labor Company] the claimant's employer." (Labor Company) was the insured of the carrier, who is the only carrier in the case.

The hearing officer determined that the claimant injured his back in the course and scope of employment and that he was unable, as a result, to obtain and retain employment at wages equivalent to his preinjury wage. He determined that the claimant's AWW, according to a fair, just, and reasonable standard, was $324.80. However, the hearing officer held that the claimant was not the employee of the Labor Company, but became the borrowed servant of (Construction Company) and that the injury was not compensable because the Construction Company did not have workers' compensation coverage on the date of injury.

The claimant has appealed, arguing that it was error for the hearing officer to relieve the carrier from liability because Construction Company was nevertheless, as a matter of fact and law in this case, a "subscriber" to workers' compensation insurance, due to the undisputed payment of premiums through Labor Company. The claimant does not dispute that he may have been the borrowed servant of Construction Company, but argues that the inquiry as to liability of the carrier is not thus ended in this case. Carrier argues that the cases cited by the claimant have already been applied by the Appeals Panel to hold that the borrower is the employer and that the Appeals Panel should not substitute its judgment for that of the hearing officer.

DECISION

We reverse and render, holding that carrier is liable for benefits under the facts of this case.

No one was present from Labor Company to offer testimony; the witnesses who testified were the claimant and an officer of the Construction Company. The claimant testified that he sought employment with Construction Company, whose business was paving, and that (Mr. H), the witness for Construction Company, informed him that it had a contract with Labor Company under which Labor Company furnished the labor. Although not developed in detail, claimant applied to and was hired by the Labor Company, which issued his paycheck, accounted for Social Security, and also provided unemployment compensation and workers' compensation for him. Although the issue of direction and control was not appealed, there was testimony from both Mr. H and claimant indicating that journeymen pavers essentially knew and understood from their experience the details of

what the work entailed and that the "supervision," as such, amounted to generalized direction as to hours of work and location of worksite. Mr. H agreed that he was onsite supervisor of claimant and provided the tools and equipment to do the job and there were no supervisory employees provided by Labor Company to oversee the work. Mr. H stated, however, that the decision to hire, fire, and reassign claimant would be solely that of Labor Company. Claimant was injured on _____, when he was moving a compactor as it began to rain at the worksite, and he slipped in the mud.

At the beginning of the CCH, the parties stipulated to various matters, including that Construction Company "did not have workers' compensation insurance coverage." This stipulation was immediately cast into ambiguity in the opening statement of claimant's attorney, in which it was asserted that Construction Company, as part of the fees paid to Labor Company, paid for workers' compensation insurance. Moreover, Mr. H testified that he relied on the fact that he had such coverage through Labor Company, that he would not have had workers out on the worksite without it, that it was specifically part of the agreement between his company and Labor Company, and that he would nearly consider it "fraud" if they did not in fact provide it. In closing argument, counsel for carrier stated that it was "extremely clear" that as part of the agreement between the Labor Company and Construction Company, Labor Company would "make sure" that workers furnished to Construction Company would have workers' compensation. Moreover, counsel for carrier argued that this was "not really" in dispute. What carrier sought to do was to avail itself of what it stated was a long line of Appeals Panel decisions holding that the carrier for the borrowed servant was the one with liability for the benefits. The claimant stated that he could not prove facts that would bring Labor Company under the staff leasing services provisions of Section 91.042, but that the same co-employment rationale should apply.

The writings which constituted or otherwise memorialized the agreement between Labor Company and Construction Company are listed in the hearing decision as "not offered or admitted." However, they came into the hearing as follows. The attorney for the claimant began to question Mr. H about the agreement. At this point in the CCH, counsel for the carrier objected that the agreement itself would be the "best evidence" of what the agreement was and he wished to see the documents about which Mr. H testified. The attorney for the claimant indicated that he had not had a chance to read the documents. The attorney for carrier stated that carrier had no objection to the documents but just wanted to see them. At this point, the hearing officer called a recess and instructed the attorney for the claimant to make copies for "all of us." When the tape of the hearing resumed, the hearing officer announced that he would mark the proffered documents as Claimant's Exhibit No. 10. Testimony about what was written on the documents was cut short by the hearing officer's announcement that "we can all read and have read that document." Argument of both parties was made assuming the presence of these documents in the record. While no formal proffer and ruling was made on the tape, none was requested by the hearing officer. Under all these facts, we will consider these documents as having been effectively admitted into the record of the case.

The documents in question, presented as reflecting the "agreement" between Labor Company and Construction Company, include a memorandum purporting to be from the

desk of (Mr. M), an account executive at Labor Company. The memorandum is signed "_____." It was directed to Mr. H, and stated:

> ___, we have to use your w/c code so the bill rate will be approx a 75% markup. We pay employee 7.50. We bill you 13.12. We pay all appropriate taxes + cover worker comp.

This was dated December 22, 1995, and Mr. H stated that it reflected the agreement in effect on the date of claimant's injury. Also included is a certificate of insurance stating that the certificate holder is Construction Company, that workers' compensation and employers' liability coverage is provided for a period of March 3, 1996, through March 3, 1997, for Labor Company as the insured, with carrier listed as the company "affording coverage." The boilerplate language on the certificate states that it is provided as a matter of information only and does not confer rights on the certificate holder or alter and extend the coverage afforded by the policy. There was no evidence or contention that any sham was involved in the arrangement between Labor Company and Construction Company.

Carrier argued that there was a long line of Appeals Panel decisions making right of control the determining factor in identifying the employer for purposes of workers' compensation. It is perhaps useful, then, as the discussion of applicable law has gotten shorter in subsequent cases of the Appeals Panel, to emphasize that the case law doctrine of "borrowed servant" evolved primarily as a means to protect the borrowing employer from common-law liability. Associated Indemnity Company v. Hartford Accident & Indemnity Co., 524 S.W.2d 373 (Tex. Civ. App.-Dallas 1975, no writ); Texas Workers' Compensation Commission Appeal No. 92287, decided August 14, 1992. Through application of this doctrine, an employee may not be paid workers' compensation benefits by his temporary services company and then sue for negligence the business on whose premises and in whose service he was injured. Marshall v. Toys-R Us Nytex, Inc., 825 S.W.2d 193, 197 (Tex. App.-Houston [14th Dist.] 1992, writ denied). The exclusive remedy of workers' compensation has been held to bar suit against the borrowing employer when the employer has paid for coverage through his payment to the temporary services company; he is thus "a subscriber" to the Act. Marshall, *supra*; Rodriguez v. Martin Landscape Management, Inc., 882 S.W.2d 602 (Tex. App.-Houston [1st Dist.] 1994, no writ). The manner in which the workers' compensation insurance is paid for is immaterial, so long as there is a compensation policy in force. Gibson v. Grocers Supply Co., Inc., 866 S.W.2d 757 (Tex. App.-Houston [14th Dist.], no writ). The Appeals Panel has most often used the borrowed servant analysis to sort of between competing carriers where the primary responsibility for payment of benefits should lie.

The carrier has countered the claimant's reliance on Marshall by arguing that a similar contention was rejected in Texas Workers' Compensation Commission Appeal No. 960711, decided May 22, 1996. First of all, we note that the situation in that case involved allocating primary responsibility between two arguably liable carriers. Second, the discussion in the case frankly indicates that the panel did not deal with the full import of the

coverage argument because the panel concluded that the agreement in that case would not "override [the borrowing company's] status as an employer under the borrowed servant doctrine." In the Marshall case, the claimant had been paid workers' compensation benefits through the temporary services company that furnished him to (employer). Therefore, Judge _____ observation that Marshall did not decide the identity of the carrier for employer is true only because payment of benefits had been readily assumed by the carrier for the temp agency. We do not believe that Appeal No. 960711, *supra*, can be taken as authority that a claimant cannot ever claim and receive benefits through the carrier for a temporary services company that hired him or her.

Indeed, the claimant in the case here does not suggest that we override the status of claimant as a "borrowed servant." It concedes that status but argues that this fact alone does not end the inquiry of whether carrier is in this case still liable for benefits to claimant. We agree.

In the instant case, workers' compensation coverage through the Labor Company was expressly contracted for and premiums were paid based upon the industry code assigned to Construction Company. The preinjury intent of Labor Company was to "make sure" that the employees it furnished were covered; a certificate was issued for Construction Company to demonstrate such coverage to third persons. To focus merely on day-to-day supervision while ignoring every other arrangement in this case results in no benefits for an employee who was plainly injured in the course and scope of employment, and employment of which Labor Company was fully apprised. There was no evidence that the arrangement was other than as testified to by Mr. H. Under the facts of this case, we believe that the hearing officer's determination that the carrier was not liable for benefits was against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust. We do not believe that the borrowed servant doctrine should be applied or the worker's compensation law be interpreted, under all the facts of this case, to strip the claimant of benefits while affording him no remedy at common law. As observed for a similar arrangement between a staff leasing company and a client company in Pederson v. Apple Corrugated Packing, Inc., 874 S.W.2d 135 (Tex. App.-Eastland 1994, writ denied), claimant became a "covered employee" through the arrangement between Labor Company and Construction Company.

The purported "stipulation" as to the lack of "coverage" for Construction Company does not bind our decision in this case. Leaving aside its ambiguity, whether there is "coverage" was in fact the ultimate legal determination to be made and was not purely a matter of fact.

We make clear that it is not our intent that this case be used to stand for the blanket proposition that a temporary labor company's agreement to furnish workers' compensation will now make its carrier the primary source for benefits in each and every case. However, a focus only on day-to-day supervision of claimant can not, in each and every case, preclude consideration of intent of the parties, the actual collection of premiums for the particular employees involved based upon the client company's business, and the evidence that the client company had effectively purchased workers' compensation

coverage through its agreement with the temporary labor company. Because it does not appear that the hearing officer considered these other factors at all in deciding liability for payment of benefits, we reverse and render a decision and order that the claimant sustained a compensable injury and has disability there from for the periods of time the hearing officer factually found that he had the inability to work, and that the carrier is liable for workers' compensation benefits to the claimant, and is hereby ordered to pay applicable income and medical benefits.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Christopher L. Rhodes
Appeals Judge