

APPEAL NO. 990686

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 3, 1999. The controversy involved coverage for a fatal injury sustained on _____, by deceased, whose surviving widow, is the respondent (beneficiary). The issue concerned who would be considered the employer of the deceased on that date for purposes of workers' compensation.

The hearing officer held that for purposes of coverage of this injury, the appellant carrier's insured, (Contractor), was the employer and the appellant carrier, the Texas Workers Compensation Insurance Fund, was liable for payment of benefits. The hearing officer held that (Utility Company) was not the employer and that the respondent carrier, Pacific Employers' Insurance Company, was not liable for benefits.

The appellant carrier has appealed, essentially arguing that because the business in which both insureds are engaged is Federally regulated, and, further, because Federal law extends the definition of "employee" to include independent contractors, the Utility Company was, as a matter of law, the employer of the deceased. The appellant carrier asserts that right of control is a nondelegable duty. The appellant carrier also argues that the hearing officer should have looked beyond the contract between the Contractor and the Utility Company in this case to see that the Utility Company actually maintained supervisory responsibility over the deceased. The appellant carrier argues that the existence of workers' compensation coverage or the collection of premiums therefor is "not a relevant factor" in identifying the employer for purposes of workers' compensation. In accordance with this line of argument, the appellant carrier argues that it was error for the hearing officer to admit evidence showing that it agreed to furnish workers' compensation insurance for deceased and persons acting in his capacity, and collected premiums therefor from the Contractor. The appellant carrier further argues that there was no evidence proving that it actually issued an endorsement to cover truck drivers that were hired and furnished by the Contractor to the Utility Company. The carrier for the Utility Company responds, asserting first and foremost that the contract between the parties as to exercise of control over truck drivers controls the relationship between the parties and coverage for the accident.

The respondent carrier argued that the preemption argument of the appellant carrier does not apply because the Contractor is a Department of Transportation (DOT) motor carrier as well, and that the purposes for which a lessor may be deemed the "employer" of persons driving its trucks do not extend to ascertainment of coverage for purposes of workers' compensation benefits. The respondent carrier argues that state law controls the actual determination of who was the "employer" in this case for purposes of workers' compensation coverage. The respondent carrier points out that the facts of the agreement between the companies here were fully disclosed and known to the appellant carrier, which nevertheless collected premiums and extended coverage for the drivers that were furnished to the Utility Company, while the respondent carrier did not collect premiums for any employees of independent contractors, including those of the Contractor in this case. The

respondent carrier argues that, considered along with the agreement between the parties and the manner in which it was carried out, the actual furnishing of workers' compensation insurance by the appellant carrier is another fact supporting liability of the appellant carrier in this case. (The respondent carrier does not expressly respond to the relevance/evidentiary point of error raised by the appeal). The claimant beneficiary adopted the response of the respondent carrier as its own. The Contractor, which presented its own evidence at the CCH as well, has not responded. While a reply to the response was also filed, there is no provision for this in the 1989 Act and it has not been considered.

DECISION

Affirmed.

Most of the essential facts were undisputed. Testimony was taken from (Mr. S), the vice president for the Mr. K, traffic controller for the Utility Company; and Mr. D, a regional superintendent for the Utility Company; as well as another claimant, Mr. W, who testified in this combined CCH. Most of the essential facts were undisputed. The deceased was actually hired by the Contractor before his injury on _____, which occurred in a motor vehicle accident sustained while he drove a truck in the course and scope of his employment as a truck driver.

Mr. W, who, it was not disputed, also drove a truck in the same capacity as the deceased, made clear that he was hired, certificated, trained, and paid by the Contractor in forklift operation and truck operation (although he was an experienced truck driver). His assignment was to drive the trucks (18-wheeler flatbeds) owned by the Utility Company, to various locations inside and outside of Texas. Mr. W said that although he reported to the Utility Company each morning and was dispatched by Mr. K, Mr. W testified (Mr. K and Mr. D agreed) that he was not directed as to the details of his performance, but rather was generally directed to the location and told where to deliver or pick up items. Safety training of deceased and other Contractor-furnished truckers was supplied by Mr. S, the vice president of the Contractor. Mr. D testified that while there were safety meetings conducted by the Utility Company and that Contractor's drivers could attend, they were not required for those drivers. Mr. K emphasized that the drivers that the Utility Company required should need little if any instruction, and that drivers who could not use their own judgment and operate relatively independently would be of no use to Utility Company. All witnesses agreed that any discipline or reprimand that may be needed was the primary responsibility of Contractor, although witnesses for Utility Company agreed that they would prevent an obviously impaired driver from driving their trucks. Mr. K also stated, however, that if an impaired person, whether employed or not, trespassed onto the premises of Utility Company, he would be removed.

Mr. S, the vice president of the Contractor, testified that Contractor was a construction services company that performed, on a contract basis, various nonelectrical services for the Utility Company over the years. The providing of certified truck drivers to the Utility Company to drive that company's trucks was a recent service that began in 1997.

Mr. S testified that the Contractor also owned its own trucks and provided both these trucks and drivers to the Utility Company under another contract. In evidence was a master agreement from 1983 governing its relationship with the Utility Company. (There was no dispute that this master agreement was in effect during the injury in question.) In pertinent part, the Contractor retains the right to direct and supervise all employees provided under the agreement to the Utility Company and remains an "independent contractor." The Contractor agrees to purchase workers' compensation insurance.

On January 2, 1997, Contractor and Utility Company entered into an agreement (incorporating the 1983 master agreement) which stated that the Contractor would provide and supervise DOT certified and licensed drivers to the Utility Company to drive its trucks. The evidence indicated that this agreement was in effect on the date of the deceased's injury. All other evidence regarding hiring, enforcement of a drug policy, and certification indicates that the Contractor was actively involved in these matters. The Contractor filed and paid all required unemployment taxes, income taxes and related paperwork.

Mr. S testified that to his knowledge, a representative from the appellant carrier had been out to the Contractor's location and audited Contractor's business. In evidence (over objection as to relevance from appellant carrier) is a Certificate of Liability Insurance provided by the insurance agency through which the Contractor obtained insurance. This certificate names the Utility Company as an "additional insured." The insurance policy documents in evidence for the coverage contract in effect on the date of the injury between the Contractor and the appellant carrier clearly includes a category for truck drivers. The records submitted to show calculation of the premium paid on a monthly basis, which is attributable to truck drivers, included the deceased.

In evidence also is a letter from the president of the insurance agency to the appellant carrier, dated October 7, 1998, expressing disagreement with the appellant carrier's decision to deny coverage for the deceased and others similarly situated. Missing from the record is any evidence from the appellant carrier or any of its employees which indicates a misunderstanding of the nature of Contractor's business or any misrepresentation on the Contractor's part which would void the contract of insurance, or which disclaims an agency relationship with the insurance agency through which coverage was arranged. By contrast, there is an affidavit from a representative of the respondent carrier which indicates that a review of the Utility Company's records showed that no premium was collected by the respondent carrier for coverage of independent contractors and an interpretation of the Certificate of Liability Insurance as showing the existence of coverage through the appellant carrier.

First, we do not agree that the hearing officer abused her discretion in admitting evidence showing the arrangement for workers' compensation insurance by the Contractor through the appellant carrier and the collection of premiums for the deceased and others similarly situated. The appellant carrier overstates our previous decisions wherein observations about such evidence were made. While such coverage evidence may not be dispositive of the question of right of control, it is clearly relevant to understanding the actions of the insured companies and construction of the agreement between them.

Second, we agree that the determination of the hearing officer concerning the identity of the "employer" for workers compensation coverage and the liable carrier in this case is amply supported by the record. 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 Co., 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 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 trier of fact may consider whether a contract's provisions were enforced, and a contract purporting to delegate 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, supra at 564. Issuance of paychecks and withholding of taxes is not conclusive of employee status. Mayo v. Southern Farm Bureau Casualty Insurance Company, 688 S.W.2d 241 (Tex. 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 Company v. Goodson, 568 S.W.2d 443 (Tex. Civ. App.- Texarkana 1978, writ ref'd n.r.e.). The hearing officer evidently regarded the contract and course of dealing between the parties as consistent in demonstrating that the instruction given by the Utility Company to the drivers amounted essentially to generalized instruction rather than supervision and right of control. She evidently found the agreement between the Contractor and Utility Company consistent with Sections 406.121 and 406.122 in allocating coverage liability.

Aside from the factual case, the appellant carrier has utterly failed to prove up its legal argument—that the Federal laws regarding interstate motor vehicle safety in some fashion were intended to preempt state jurisdiction over workers' compensation benefits. While the carrier argues that the applicable *Code of Federal Regulation* (CFR) provisions concerning interstate motor vehicles encompass Title 49, Sections 390-399, we observe that 49 CFR §§ 301 through 399 all bear on operation of motor vehicles in interstate commerce. 49 CFR §355.25, entitled "Compatibility of State Laws and Regulations Affecting Interstate Motor Carriers," indicates that if there is preemption, it extends only to incompatible motor vehicle safety statutes and regulations. We find nothing indicating an intention to preempt state workers' compensation laws, benefits payable thereunder or the definitions pertinent thereto. While 49 CFR § 390.5 includes "independent contractors" who are driving motor vehicles within the definition of "employee" for purposes of those

regulations, this does not equate to cessation of the concept of "independent contractor" entirely. The principal case cited by the appellant carrier, White v. Excalibur Insurance Company, 599 F.2d 50 (5th Cir. 1979), involved not only the application of Georgia law (and Federal regulations in existence at that time) but the refusal of the Federal court to find an independent tort action in Federal or Georgia law which would override the remedies available under that state's workers' compensation laws for the death of a truck driver who was asleep when the accident in question occurred. As that case noted, the purpose of Federal regulations including independent contractors in the definition of employees was to prevent motor carriers from avoiding responsibility for the negligence of drivers by denoting them as "independent contractors." We agree with the hearing officer's conclusion that this case does not control or dispose of the Texas workers' compensation issue before her. A party who seeks to prove Federal intrusion into areas of the law which are involve state-created remedies bears a stronger burden than merely eliciting questions concerning general Federal oversight of a business and providing selective excerpts from the CFR and citations to dicta or application of other state's laws in Federal court tort cases.

As the hearing officer further points out, even if she were to accept the Utility Company as the "employer" in this case, the rationale set forth in Texas Workers' Compensation Commission Appeal No. 962625, decided February 7, 1997 (and cases cited therein), applies here.¹ The Utility Company clearly contracted and arranged for workers' compensation coverage of the drivers through the Contractor. The undisputed evidenced shows that coverage therefor was actually provided by the appellant carrier and the nature of Contractor's business was fully disclosed and known to the appellant carrier. Appellant carrier is still the liable carrier even under its theory of preemption in the definition of "employee."

¹ The earlier cases cited by the appellant carrier concerning incorporation of state carrier laws into a contract are factually distinguishable and did not involve drivers who had been supplied by another certificated carrier under a contract similar in operation to that in this case.

Finding the appealed points without merit and the decision of the hearing officer supported sufficiently by the record, we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Dorian E. Ramirez
Appeals Judge