APPEAL NO. 991200

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 4, 1999, with the record closing on May 18, 1999. The sole issue at the CCH was whether (company) or (agent) was the respondent's (claimant) employer for workers' compensation purposes on _____. The hearing officer determined that company was the claimant's employer for workers' compensation purposes on _____. The appellant (carrier) appeals, urging the hearing officer erred in finding that company retained a right of control of the day-to-day activities of the claimant and other similar employees of agent because there is no evidence to support such a determination and, alternatively, such determination is against the great weight and preponderance of the evidence. The claimant replies that the hearing officer's decision is correct, is supported by the evidence, and should be affirmed.

DECISION

Reversed and rendered.

Most of the underlying facts were not disputed. The claimant was hired at agent in City 1, by Mr. JWH, an officer of the company. The claimant worked for Mr. JWH in various capacities including driver, for approximately seven years. On _____, the claimant was injured in Country, while unloading a moving truck of household goods. The move originated out of City 1, and the truck was owned and operated by agent. agent did not have authority to make interstate moves except through company. The claimant was instructed by Mr. JWH to pack the truck, prepare the inventory, and to drive the truck when another agent employee failed to show up. The claimant was accompanied on the trip by a helper, another agent employee. The claimant was paid by agent and social security and federal income tax deductions were taken from the claimant's paycheck.

The truck driven by the claimant contained the words company and agent. No one from company was present at any time during the loading, transportation, or unloading of the move. Mr. JWH gave the claimant money for meals, lodging, tolls, and for another helper provided by a local agent when they arrived in Country. The claimant was instructed by Mr. JWH to pick up another load in the same region upon completion of the delivery to Country. If something unexpected came up, such as inclement weather, the claimant testified he would have contacted Mr. JWH.

Agent had a contract with company in effect on _____. The contractual agreement between company and agent consisted of three documents: an Agency Contract, an Agency Trucking Agreement, and the company Manual.

The Agency Contract provides:

9.0 Company [company] and Agent [agent] agree that each of them is an independent business and that each is an independent employer. The parties intend to create, and hereby create, a relationship of contractor and contractee, and not an employer-employee relationship, and they agree that they are not and shall not be considered co-employers or joint contractors with respect to the employees, contractors, or sub-contractors of each other.

The Agency Trucking Agreement provides:

> 4. Helpers. Agent agrees to provide, direct and supervise such additional labor, at Agent's expense, as is required to load, pack, crate, unload, unpack and uncrate shipments for Company.
>
> 1. Driving and Operation of Motor Vehicles. Agent agrees to either personally drive and operate the aforesaid vehicular equipment, or to furnish, at Truckman's expense, qualified drivers thereof, provided that Company shall have the right to remove from said vehicular equipment the driver thereof, and, at Agent's expense, replace said driver with another chosen by it, whenever, in Company's opinion, such removal and replacement is in the public interest, or for the protection of Company and its shippers.
>
> 6(c). Company agrees to maintain and keep in force, as to all drivers and helpers furnished by Agent hereunder, so-called workmen's compensation insurance, and to comply with all applicable so-called workmen's compensation laws, and such lawful rules, regulations, and orders as are made and entered thereunder, and Agent agrees to assume and pay, as to said persons, any and all so-called social security, income withholding, and other like taxes and liabilities.
>
> * * *
>
> 14. Modification or Amendment of Agreement. The above-mentioned "Schedule of Agent's Compensation" and "Agent's Manual" are incorporated herein by reference and made a part hereof, and Company and Agent agree that either or both may, from time to time, be modified by Company upon notice thereof to Agent.

The company Manual provided that all drivers hauling shipments under company authority are required to be qualified by company. To become qualified, a driver must complete an application, meet minimum Department of Transportation (DOT) requirements, and pass a background, criminal, drug, and physical test.

Before the shipment left City 1, it was registered through company 's computer and dispatch system in City 2, State. The move was under the certificate of authority of company and the shipment used company documents: service agreement, customer

invoice, bill of lading, freight bill, and household goods inventory. Company received a percentage of the packing and was responsible for the insurance on the shipment and any damage and claims to the shipment.

Agent did not have a policy of workers' compensation on _____. The carrier asserted that had the claimant been either a qualified driver or an authorized helper at the time of injury, it would have provided workers' compensation coverage. It was undisputed that, at the time of the injury on _____, the claimant was neither a qualified driver or authorized helper of company. The claimant had been a qualified driver, but his status was revoked by company on April 16, 1985. After the claimant's injury, company sent agent a letter which stated that operating vehicles with terminated drivers is a very serious violation of company 's policy and a penalty of $1,000.00 would be assessed.

The claimant presented the deposition of Mr. JWH from a separate proceeding involving the parties. Mr. JWH testified that he understood that, if agent was engaged in a company shipment, agent was under their banner and would be covered by company 's workers' compensation coverage, regardless of whether they were a qualified driver or authorized helper. Mr. JWH testified that company has the ability under the contract to control the actions of agent employees during an interstate move if a driver is unfit, late, or unruly. According to Mr. JWH, company is not normally physically on the premises supervising what is being done, but has supervised on occasion if they are visiting or it is a special account.

The carrier presented the testimony of Mr. Mr. JAH, the owner of agent, and Mr. A, a senior administrator with company, to support its position. Mr. JAH testified that Mr. JWH was the supervisor of the claimant on _____, and gave the claimant instructions to accomplish the move from City 1, to Country. According to Mr. JAH, company did not give specific directions on how to pack a load or what type of vehicle to drive, but had requirements and policies. Mr. JAH testified that a field man from company visited the agent premises one or two times per year. Mr. A testified that company does not have the right to exercise any direct supervisory authority over drivers of its agents. He also stated that company has no means to communicate directly with agent drivers.

An employee seeking workers' compensation benefits has the burden of establishing an employer-employee relationship out of which the compensable injury arose. Texas Workers' Compensation Commission Appeal No. 94397, decided May 13, 1994; Texas Workers' Compensation Commission Appeal No. 94358, decided May 11, 1994. Texas courts have recognized that a general employee of one employer may become the borrowed servant of another employer. The central inquiry becomes which employer had the right of control of the details and manner in which the employee performed the necessary services. Carr v. Carroll Company, 646 S.W.2d 561 (Tex. App.- Dallas 1982, 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.).

The hearing officer, applying the borrowed servant doctrine, found that on _____, company retained the right to exercise control over the day-to-day activities of the claimant and other similarly situated employees. We can infer that the hearing officer found that the contractual provisions did not apply to provide coverage to the claimant and we agree. The contract limited the scope of coverage to qualified drivers and authorized helpers, and the claimant was neither. The contract did not contain an express provision for the right to control and the facts and circumstances must be considered. The evidence did not support that the contract was a sham or had been abandoned. Under the contract, the only right company had was to remove and replace agent 's driver. This does not amount to a right to control the actions of the claimant. The evidence shows that all control over the claimant prior to and at the time of the injury was exercised by agent. agent hired the claimant, paid the claimant, and directed the claimant to drive the truck owned by agent. The fact that the vehicle was leased to company for purposes of interstate travel does not determine the claimant's employee status. While company did have the exclusive use, possession, and service of such vehicle performing its services with the ultimate right of removing the driver of the vehicle, claimant received all of his instructions from agent. The hearing officer's finding that on _____, company retained the right to exercise control over the day-to-day activities of the claimant and other similarly situated employees is against the great weight and preponderance of the evidence. We reverse Finding of Fact No. 7 and Conclusion of Law No. 1 and render a new decision that agent was the claimant's employer for workers' compensation purposes on _____, and the carrier for company is not liable for benefits.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Judy L. Stephens
Appeals Judge