APPEAL NO. 991870

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 July 16, 1999. The issues at the CCH were whether the appellant (claimant) was injured in the course and scope of employment on _____; whether (BCC) or Mr. JS, a nonsubscriber, was the claimant's employer for purposes of the Texas Workers' Compensation Act; whether the respondent (carrier) is relieved from liability under Section 409.002 because of the claimant's failure to timely notify BCC pursuant to Section 409.001; and whether the claimant had disability from December 7, 1998, through the present. The hearing officer determined that the claimant was injured in the course and scope of his employment on _____; that Mr. JS was the claimant's employer for purposes of the Texas Workers' Compensation Act; that if the carrier had been found liable for the claimant's injury, the carrier would not be relieved from liability under Section 409.002 because the claimant timely notified BCC pursuant to Section 409.001; and that the claimant had disability from December 7, 1998, through the date of the CCH. The claimant appeals, urging that the hearing officer's determination that Mr. JS is the employer is not supported by sufficient evidence and is against the great weight and preponderance of the evidence. The claimant also asserts that the hearing officer's findings incorrectly reflect (assumed date of injury), and should read _____. The carrier replies that the hearing officer's reference to (assumed date of injury), appears to be a typographical error, and that the hearing officer's decision is supported by legally sufficient evidence and is not against the great weight and preponderance of the evidence. The determinations that the claimant was injured in the course and scope of employment on _____, that the carrier is not relieved from liability under Section 409.002, and that the claimant had disability from December 7, 1998, through the date of the CCH, have not been appealed and have become final. Section 410.169.

DECISION

Affirmed, as reformed.

The parties agree and the record indicates that all references in the findings of fact to (assumed date of injury), are typographical errors. For this reason we reform Findings of Fact Nos. 2 through 7 such that references to (assumed date of injury), will be changed to _____.

It was the claimant's position that on _____, the day he was injured, he was the employee of BCC, a construction company. The claimant testified that he was employed by BCC in 1997 as a laborer, working at various job sites; that in 1998, he was assigned to the (L&F) job site and was supervised by Mr. JP; that Mr. JP gave him instructions, assigned his hours, and gave him a helper, Mr. M; that Mr. JP told him to go to a different job site (freezer project) and sand iron in April 1998; that he was never told that he was an employee of Mr. JS while working on the freezer project; that Mr. JP took him to the freezer project, provided the tools and gave him instructions on what to do almost every day; and

that the freezer project lasted one and one-half or two months. The claimant said that he worked at both the L&F and the freezer project simultaneously, and received cash on the same day that he was paid by check from BCC for his work at L&F. The claimant testified that both Mr. JP and Mr. JS paid him, half in cash and half by check. The claimant was injured on _____, while on the freezer job site, and Mr. JS was nearby. According to the claimant, Mr. JS called Mr. JP, informed Mr. JP that the claimant had been injured, Mr. JP told Mr. JS not to take the claimant to the hospital, and Mr. JP came to the freezer project site and treated the claimant. The claimant testified that Mr. JS worked for BCC and at the freezer project, but he never saw Mr. JS performing any work at the freezer project. The claimant said he worked at the freezer project for two days after the injury, and continued to work for BCC until July 1998, when he was terminated from employment by Mr. JP.

Mr. M testified that he was a BCC employee and worked with the claimant at both the L&F and freezer project; that on _____, he thought he was working for BCC; that no one ever told him that he was working for Mr. JS; and that Mr. JP told claimant to take him to the freezer project. Mr. M said that three other workers on the freezer project were employees of Mr. JS. According to Mr. M, he received cash from Mr. JS and Mr. JS said that if he worked seven or more hours, Mr. JP would pay half and Mr. JS would pay the other half.

The carrier presented the testimony of Mr. JP to support its position that the claimant was the employee of Mr. JS. Mr. JP testified that he was a project manager for BCC and that the claimant was employed intermittently depending on work availability; that as the L&F job neared completion, he had no work for the claimant and Mr. M; that he knew Mr. JS had a business of his own; that he asked Mr. JS if he had any work for the claimant and Mr. M for a couple of weeks until they were needed again; that the claimant and Mr. M went to work on the freezer project for Mr. JS; that he had no control over the details of the claimant's work or hours at the freezer project; and that he did not collect the claimant's key to BCC's tool storage area during the two-week freezer project, but did not give him permission to use BCC's tools. According to Mr. JP, the claimant was not working at the freezer project and the L&F job site simultaneously, and he paid the claimant for all of the work performed at L&F by BCC check. Mr. JP said that the claimant's last day worked at BCC was on April 14, 1998, and he returned to work for BCC on May 4, 1998. Mr. JP testified that on _____, Mr. JS called him, said that the claimant had been injured and would not go to the doctor, so he went to look at the claimant's injury and after the claimant refused to go to the doctor, he bandaged the claimant's knee. Mr. JP said that he and the owner of BCC visited the freezer project, but only out of professional curiosity, since the freezer project was a smaller scale version of BCC's usual construction work.

An employee is "each person in the service of another under a contract of hire, whether express or implied, or oral or written." Section 401.012(a). 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 question 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.). Where there is no contract or agreement addressing the subject, the right to control the work may be established by circumstantial evidence. Texas Workers' Compensation Commission Appeal No. 931102, decided January 13, 1994.

There was conflicting testimony presented concerning who gave the claimant directions, assigned him to the freezer project, controlled his hours, provided the tools, and paid him. These were all issues of fact for the hearing officer to resolve in determining who had the right of control. The hearing officer states:

> The one point on which all of the parties testimony was in agreement was that Claimant and [Mr. M] were paid by Mr. JS during the two week period they worked on the freezer job. Thereby indicating to this Hearing Officer that on the date of the injury, the Claimant was employed by [Mr. JS].

The claimant asserts that the hearing officer's decision hinges on this statement and that the testimony of the claimant and Mr. M did not indicate that they were paid by Mr. JS. The record indicates that the claimant was repeatedly questioned about how he was paid for the freezer project and by whom, and his testimony was contradictory and unclear. Mr. M testified that he received cash from Mr. JS. Who paid the claimant for the services performed, although not determinative, was a factor for the hearing officer to consider. In evidence were pay stubs from BCC to the claimant which show paychecks were issued on April 1, April 8, April 15, May 6, May 13, May 20, May 27, June 3, June 10, and June 17, 1998. The hearing officer considered all of the evidence before her and determined that Mr. JS was the claimant's employer for purposes of the Texas Workers' Compensation Act.

The determination of whether a person is an employee of the employer is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 950075, decided February 28, 1995. The contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Although the claimant stated that Mr. JP, an employee of BCC, exercised a right of control over him, we conclude that the determination regarding his employee status is not so against the

great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

The decision and order of the hearing officer are affirmed, as modified.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I concur only because I interpret the hearing officer's decision as stating that she believes a new contract of hire was formed with Mr. JS while claimant was in a temporary layoff status with (BCC). And I think she believed that the claimant knew that was the case. The borrowed servant doctrine in my opinion is a rabbit trail, having nothing to do with this case because BCC is arguing that claimant was not their employee at all when he was injured. The doctrine of borrowed servant arises when there is the threshold existence of an employment contract with the "lending" employer, such that a borrowing can be said to occur. There can be no "borrowing" when claimant is not at that point already employed by the lending company. My sense is that, in part due to the curious absence of Mr. JS but also to contradictory or undeveloped testimony, the hearing officer was not given 100% of the pieces to work with. Some description of what claimant's past working relationship had been with BCC and Jack Penn would have gone far in setting the context or lending credibility for his stated belief that this was simply another BCC assignment.

_____
Susan M. Kelley
Appeals Judge