APPEAL NO. 002202

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 23, 2000. With regard to the disputed issues, the hearing officer determined that the respondent (claimant) was not an independent contractor; that JO was the claimant's employer on _____ (all dates are 1999 unless otherwise noted); that the claimant sustained a compensable (low back) injury moving a piano on _____; and that the appellant/cross-respondent, (Carrier F) waived the right to dispute compensability of the claimed injury. The hearing officer's order reads as follows:

> [Carrier F] is **ORDERED** to pay medical benefits to Claimant in accordance with this decision, the Texas Workers' Compensation [1989] Act, and associated Rules. [Emphasis in the original.]

Carrier F appeals, contending that the claimant was not a borrowed servant, that the claimant was an independent contractor, that the claimant had not sustained a compensable injury, and that its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) both timely and sufficiently disputed compensability. Carrier F requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent/cross-appellant, (also referred to as _____ in its appeal) (Carrier Z) appeals the hearing officer's order, asserting that Carrier F is reading that order as applying to medical benefits only and that Carrier Z "must remain liable for all indemnity benefits paid to date." Carrier Z requests that we modify the hearing officer's order to reflect that Carrier F is "liable for medical and indemnity benefits." Both carriers filed responses to the other's appeal. The appeal file does not contain a response from the claimant.

DECISION

Affirmed as modified.

This is a somewhat complex case where it is difficult to tell the players without a score card. In order to facilitate redaction and to help in understanding the proceedings, the participants are identified as follows: the injured employee is the claimant. It is fairly undisputed that the claimant was hired by the local (G Company), which is owned by and is apparently the same legal entity as _____, referred to as _____ in the hearing officer's decision but which we will refer to as G/N. Mr. L is in a supervisory position and is the dispatcher for G/N. G/N has workers' compensation coverage with Carrier Z. JO is a "line" driver who is either an independent contractor or affiliated with a different _____. JO has workers' compensation coverage with Carrier F.

The claimant testified that he is a mover and was hired by Mr. L. Generally, the testimony was that the claimant would report in to Mr. L in the morning and Mr. L would decide whether the claimant (and others) would work in G/N's warehouse unloading trailers

or whether the claimant was to be loaned out ("borrowed out") to out-of-state (and other) "line" drivers who request help with a move. The claimant said most of his work was with line drivers. JO was such a line driver, apparently from California, who requested assistance, and on _____, Mr. L assigned the claimant and another coworker to assist JO. The claimant testified that when he worked for Mr. L in the warehouse he was paid $7.00 an hour by check. When he was assigned to assist line drivers, the line drivers would determine how much the claimant got paid, usually $10.00 an hour in cash at the end of the day with the claimant (or the worker) signing a "temporary contract/receipt" showing the amount the driver had paid that day. The claimant testified that the driver, in this case JO, directed the activity, supervised the claimant, determined the hours and furnished the tools, dollies and supplies. (There was testimony that on occasion a driver would get extra boxes or cartons from G/N if they ran short.)

The claimant testified that toward the end of the day on _____, they were moving a baby grand piano when the claimant felt sharp back pain. The claimant said that he said "ouch" or words to that effect, telling JO that he had hurt his back. The claimant was paid $110.00 cash for 11 hours work on _____ by JO. The claimant testified that he thought the pain would go away and worked in the warehouse the next day, December 7. The claimant said that he worked with JO again on December 8 and in the warehouse on December 9. The claimant was working on a job for G/N on December 10 and in moving a television set "again" felt back pain. The testimony and evidence is conflicting as to how much pain, if any, the claimant had during the three or four days he worked after _____. The claimant testified that he had had continued pain which got progressively worse. In any event, the claimant told Mr. L about his back pain after the December 10 television incident and Mr. L referred the claimant to JO who told the claimant to see a doctor. JO stated that the claimant reported the _____ piano moving injury on December 10.

The claimant testified that he sought medical treatment from Dr. T, apparently a chiropractor, who was in association with or officed with Dr. F. No report from Dr. T is in evidence but reports from Dr. F indicate that the claimant was examined on December 10 and diagnosed as having "[l]umbar intervertebral disc syndrome with accompanied lumbar radiculitis." The claimant was taken off work (disability is not an issue) and was referred to Dr. B. Both Dr. F and Dr. B refer to the piano incident and Dr. B has a diagnosis of left sciatic radiculitis. There is no medical evidence to the contrary. Carrier Z has paid medical and indemnity benefits to the claimant. Although reimbursement is not an issue, rather clearly Carrier Z is seeking reimbursement from Carrier F.

Carrier F indicates on its TWCC-21 dated December 30 that it received the first written notice of this injury on December 29. The participants all agree that the dispute was timely but the claimant and Carrier Z contend that the dispute was inadequate to dispute compensability. The reason listed for the dispute was:

> Carrier [F] dispute[s] this claim in its entirety. [Carrier F] denies that the [claimant] sustained an injury as an [employee] of [Carrier F's] insured. The

> [claimant] was [employed] with [G/N] agents and working with the insured under the borrowed servant act. Per Labor Code Sec. 406.163.

Carrier Z contends both that this is an insufficient dispute of compensability and is a "judicial admission" that the borrowed servant doctrine is applicable.

Section 406.163 deals with liability of a labor agent and is not applicable here. The Appeals Panel has addressed the borrowed servant doctrine from time to time. In Texas Workers' Compensation Commission Appeal No. 941124, decided October 6, 1994, we discussed a number of borrowed servant cases, noting that the 1989 Act does not change, restrict, abandon or abolish the "borrowed servant" doctrine. That case went on to state that we have generally applied the right-of-control and borrowed servant theories and said:

> The Appeals Panel has held that the rule in Texas with regard to the "borrowed servant" doctrine is that a general employee of one employer may become the borrowed servant, or special employee, of another. Sparger v. Worley Hospital, Inc., 547 S.W.2d 582 (Tex. 1977). This doctrine protects the employer who had the right of control from common-law liability. [Associated Indemnity Company v. Hartford Accident and Indemnity Company, 524 S.W.2d 373 (Tex. Civ. App-Dallas 1975, no writ)]. The essential question in the determination is who has the right of control of the details and the manner of the work. Denison v. Haeber Roofing Co., 767 S.W.2d 862 (Tex. App.-Corpus Christi 1989, no writ). If the general employer controls the manner of an employee's performing services, the general employee remains liable but if the employee is placed under another employer's control in the manner of performing services, the employee becomes the borrowed servant of that employer. Producers Chemical Co. v. McKay, 366 S.W.2d 220 (Tex. 1963). An individual may become a borrowed servant as to some acts and not to others. Hilgenberg v. Elam, 198 S.W.2d 94 (Tex. 1947). If the right of control is not expressed by oral or written contract between the employers, it may be inferred from such facts and circumstances as the nature of the general project, the nature of the work to be performed by the machinery and employees furnished, acts representing an exercise of actual control the right to substitute another operator of a machine, ...

The hearing officer commented on the activities of JO, as a line driver, and concluded that JO may or may not have been an independent contractor "but he certainly was Claimant's Employer at the time the Claimant was injured." The hearing officer also found that the claimant was not an independent contractor. The hearing officer commented that JO's "workers' compensation carrier [Carrier F] is therefore liable for Claimant's compensable injury." Carrier F's appeal recites the black-letter law that the right to control the servant's activities is paramount in determining whether the employee is a borrowed servant. Carrier F argues that G/N retained actual control over the details of the claimant's work at the time of the injury and that JO used boxes that were supplied by G/N's warehouse. In the

alternative, Carrier F argues that the claimant was an independent contractor. We find little, if any, support for Carrier F's assertions and find sufficient evidence to support the hearing officer's decision on this issue.

On the issue of injury and more particularly whether the claimant sustained his injury on _____ helping move the piano or on December 10 lifting the television, Carrier F argues that the claimant did not sustain an injury as defined in Section 401.011(26), that pain alone does not constitute an injury, and that the MRI was normal. Be that as it may, the hearing officer could, and obviously did, find sufficient evidence in the reports of Dr. F and Dr. B that the claimant had at least a strain or sprain sustained on _____. The extent of injury is not at issue, only whether there was a compensable injury. We affirm the hearing officer's decision as being sufficiently supported by the evidence.

On the issue of adequacy of the dispute of compensability the hearing officer writes:

> Regarding whether [Carrier F] sufficiently contested the compensable injury, my review of Carrier [F's] Exhibit #2 shows that the disputation was both global and specific. [Carrier F] disputed the claim "in its entirety," as well as denying that the Claimant sustained the injury as an Employee of Carrier [F]. Global contestations are not effective. Since [Carrier F] did not contest whether or not the Claimant sustained a compensable injury on the date in question, I find that [Carrier F] did not sufficiently contest the claim. Of course, this issue is effectively moot as the Claimant was an employee of [JO] and [JO] has workers' compensation insurance with [Carrier F] and even if I had found that [Carrier F's] contestation was sufficient, they would still be liable for this Claimant's compensable injury.

Carrier F argues, among other things, that Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no writ) held that a carrier's failure to contest compensability cannot create an injury as a matter of law. While we agree with that general assertion, in this case the hearing officer found that the claimant had sustained an injury, a finding supported by both the claimant's testimony and some medical evidence. We have affirmed that finding and consequently there was an injury independent of Carrier F's failure to adequately contest an injury in the course and scope. The adequacy of the TWCC-21 is a question of law and we hold that the hearing officer's determination that the TWCC-21 was not adequate to contest on any ground other than whether the claimant was an employee of JO to be supported by the evidence. We also note that if the claimant had not been an employee or borrowed servant of JO, Carrier F would not have been liable, whether they filed a TWCC-21 or not. Texas Workers' Compensation Commission Appeal No. 960500, decided April 19, 1996.

Regarding Carrier Z's appeal requesting modification of the hearing officer's order, a reading of the hearing officer's Statement of the Evidence and Discussion, as well as the findings of fact and conclusions of law, leads us to believe that there is nothing to indicate either in the hearing officer's decision or in the evidence presented that the hearing officer

intended to omit the words "and income benefits" from the "order" portion of his decision. In fact, in the discussion quoted above the hearing officer remarks that Carrier F is "liable for this Claimant's compensable injury." As Carrier F states, indemnity was not at issue and the order appears to be "boiler plate" with the omission of the phrase "and income." We conclude this was an inadvertent administrative omission and modify the hearing officer's order to read:

> Carrier [F] is **ORDERED** to pay medical and income benefits to Claimant in accordance with this decision, the Texas Workers' Compensation [1989] Act, and associated Rules.

Accordingly, the hearing officer's decision and order, as modified, are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Judy L. Stephens
Appeals Judge