APPEAL NO. 002448

Following a contested case hearing held on September 21, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the respondent (claimant) was the employee of (the agent). The appellant, (carrier T), asserts that the hearing officer committed a reversible error and requests that the Appeals Panel reverse the hearing officer's decision and render a new decision that the claimant was the employee of respondent's, (carrier F), insured, Mr. S. The determinations that the claimant sustained a compensable injury and had disability resulting from the compensable injury were not appealed and have become final.

DECISION

Reversed and rendered.

On April 12, 2000, the claimant was employed as a helper/furniture mover by the agent. He reported to work that day and was advised by Mr. W to go with Mr. S to help him load household goods. Mr. S is an independent contract driver for the agent. It was undisputed that the van into which the household goods were to be loaded was identified as the agent's van and that the agent supplied Mr. S with the tools and equipment used in the prosecution of the work. Mr. S's independent contractor status was undisputed.

As the claimant was bringing boxes of books from a second floor bedroom to the van, he sustained an injury. At the time the claimant was injured, Mr. S was in the van and was not actively supervising the minute details of the claimant's work. It was undisputed that the only people with Mr. S were the claimant and another helper.

Carrier T asserts that the claimant was Mr. S's borrowed employee at the time of his injury. Carrier F asserts that the claimant continued to be the general employee of the agent and not Mr. S's borrowed servant. The hearing officer agreed with carrier F.

A similar situation was addressed in Texas Workers' Compensation Commission Appeal No. 002202, decided on October 25, 2000. The Appeals Panel in that case affirmed the hearing officer's decision that a helper on a moving van was the borrowed servant of the driver. In Texas Workers' Compensation Commission Appeal No. 941124, decided October 6, 1994, the Appeals Panel discussed the borrowed servant doctrine, stating:

> The Appeals Panel has generally applied the right-of-control and borrowed servant theories in its decisions. [citations omitted]. 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, and so forth. [citation omitted].

In the case before us, there is no evidence of a current written contract between Mr. S and the agent. The hearing officer's determination that the agent, Mr. S, had the right to supervise and control the claimant's activities after leaving the agent. The mere fact that it was unnecessary for Mr. S to closely supervise the claimant is not determinative. The claimant was Mr. S's employee at the time of the claimant's injury.

We reverse the hearing officer's determination that the claimant was the employee of the agent at the time of his injury and render a new decision that the claimant was Mr. S's employee.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge