APPEAL NO. 002543

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 September 7, 2000. The issues at the CCH had to do with who provided the workers' compensation insurance for, and who was the employer of, the claimant, Mr. W, on _____. The parties were (appellant/ carrier 1), who provided insurance for (contractor) and (respondent/carrier 2), who insured (company), on the date of injury.

The hearing officer determined that the claimant was the employee of the contractor and that the appellant/carrier 1 was liable for benefits.

The appellant/carrier 1, through two law firms, has appealed, and essentially argues that it was the company that had the right to control the details of the claimant's work such that he became a borrowed servant of the company, and that the respondent/carrier 2 is therefore liable for benefits. Respondent/carrier 2 responds that the evidence, including the claimant's testimony, clearly supports the decision of the hearing officer. There is no response from the claimant.

DECISION

Affirmed.

The claimant, a welder, was injured in an accident on _____, while welding on a pipeline for the company. He sustained severe burns to 55% of his body.

Although the evidence is voluminous in size, the hearing officer has done a good job of cutting through to the salient facts. We incorporate her recitation of the facts. In addition, we would add the following:

The claimant was supplied as a welder to the company. The claimant was an experienced welder whose deposition makes clear that he supplied his own tools, for which he was paid a rental fee by the contractor, in addition to an hourly wage paid by the contractor.

When the claimant was at the job site, his liaison with the company was Mr. Y. Both agreed that while Mr. Y gave general direction about where to cut the pipeline and directed laborers in the sequence of events, the details of the cutting, grinding, and beveling operations that were part of the process were left up to the claimant, who needed minimal instruction, according to both men. Mr. Y said that he did not request a separate foreman from the contractor because he felt that the claimant would be a working foreman.

In his edited videotaped deposition, Mr. R, the project manager for the contractor, stated that the contractor was in the pipeline construction business. Mr. R said that the contractor operated as the prime contractor and did not subcontract out its work. He

described the claimant as "our welder." He said that he had the telephone conversation with Mr. Y in which the claimant's services were particularly requested. Mr. R suggested having a foreman on site for safety reasons and Mr. Y told him he did not need one. Mr. R said that it was his "purely speculative" assumption from this that Mr. Y would be directing the operation at the work site. Mr. R said that the contractor "typically" provided a foreman. It was Mr. R's position that a welder would need independent supervision in conducting his duties.

The relationship between the company and the contractor that governed the claimant's presence at the work site was covered by a blanket procurement agreement. Workers were supplied on an hourly basis; equipment was rented and materials were billed on a cost-plus basis. The contractor agreed that it would furnish workers' compensation insurance as well as liability insurance, and would be performing work "independently in a dangerous environment with minimal supervision from [company]." The contractor also agreed to a warranty of work performed by the persons it supplied with defects to be remedied at its own expense up to a year after the work is completed. And, finally, the contractor is described as "an independent contractor, and as such shall have and maintain exclusive control and direction over its employees, agents, subcontractors, and operations." The contractor agrees to indemnify the company from death or injury of any person resulting from the contractor's performance of the agreement.

Part of the blanket agreement included a document entitled "Independent Contractor Safety Practices Guideline." The contractor was given primary responsibility for taking reports of injury and filing paperwork regarding workers' compensation, OSHA, and other governmental entities. The contractor and the company shared responsibility for safety at the work site under this agreement, with the contractor essentially agreeing that its workers would abide by safety rules and refrain from engaging in certain hazardous conduct. The purpose of the document is described as establishing minimum requirements for contractors performing work for the company. Mr. Y testified that persons who performed welding through contractors with the company were required to be certified as to competence by the company every six months. Another portion of the agreement required the contractor to contact the company to arrange for safety meetings.

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 as 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 v. Carroll Co., 646 S.W.2d 561 (Tex. App.-Dallas 1982, writ ref'd n.r.e.).

The trier of fact can consider other evidence to determine whether the contract is a sham or has been abandoned, *see* Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964), or where the contract does not clearly speak to the right of control. Archem Company v. Austin Industrial, Inc., 804 S.W.2d 268 (Tex. Civ. App.-Houston [1st Dist] 1991, no writ). Issuance of paychecks and withholding of taxes is not conclusive of employee status. Mayo v. Southern Farm Bureau Casualty 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." United States Fidelity & Guaranty Company v. Goodson, 568 S.W.2d 443 (Tex. Civ. App.-Texarkana 1978, writ ref'd n.r.e.).

Leaving aside the post-accident testimony concerning how the claimant was supervised on the job where he was injured, the provisions in the blanket agreement support the hearing officer's determination that the contractor retained employer-like controls over the claimant. The contractor (including its employees and subcontractors) is plainly described as an "independent contractor" with respect to its performance of work for the company. We believe that the provision of a warranty for work is especially instructive and consistent with maintenance of control over the details of the work, rather than some sort of gratuitous agreement to stand behind the work of the employees of the company. While the appellant/carrier 1 argues that the certification process was part of the "control over the details" of work, Mr. Y made clear that it was essentially a skills-level test to assure minimum standards of competence.

While we would disagree with the hearing officer's observation in her discussion that the blanket agreement does not expressly address the question of control, we cannot quarrel with her analysis of the case and application of law to the facts at hand. As she noted, the general sort of supervision provided by Mr. Y did not serve to establish an employer/employee relationship between the claimant, a skilled worker, and the company.

We affirm the decision and order of the hearing officer that the appellant/carrier 1 is liable for, and ordered to pay, workers' compensation benefits to the claimant.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge