APPEAL NO. 002579

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 15, 2000. The issues at the CCH were whether the appellant (claimant) was injured on _____, and had disability from this injury, and the identity of the claimant's employer for purposes of workers' compensation insurance. The issue was also raised as to whether the responsible carrier had timely filed a dispute to compensability of the claim within seven days (not 60 days) of receiving written notice of injury. An election-of-remedies issue was withdrawn from consideration at the beginning of the CCH.

The hearing officer found that the claimant was injured on _____, but had disability only from August 11, 1999, until December 7, 1999. The hearing officer found that the claimant was the borrowed servant of (client company) who was insured by the respondent/cross-appellant (Carrier 1), who was liable for benefits to the claimant. She further held that as the case of Downs v. Continental Casualty Insurance Co., No. 04-99-00111-CV, 2000 WL 72141 (Tex. App.- San Antonio) has not reached final resolution, it would not be applied in this case, and that Carrier 1 therefore had timely disputed compensability of this claim.

Two parties have appealed. The claimant argues that the hearing officer erred in ending disability on December 7, 1999, which was the day that the claimant applied for unemployment compensation benefits and represented that he was available for work. The claimant argues that the medical evidence in the file proves an inability to work due to his injuries. Carrier 1 appeals the determination that it is the liable carrier through the application of the borrowed servant doctrine. Carrier 1 argues that the purpose of the doctrine is to assure coverage only if the hiring employer does not have workers' compensation insurance. Carrier 1 asks that the Appeals Panel regard contractor/subcontractor cases as dispositive, and that the intent of the parties in this case was that (Company T) should provide workers' compensation insurance. Carrier 1 also appeals the findings on injury and disability.

Carrier 1 responds to the claimant's appeal by pointing out that it timely disputed compensability within 60 days of written notice of injury. Carrier 1 responds that because the claimant was not injured at all, he has no disability, let alone disability beyond December 7, 1999. The respondent (Carrier 2), responds to both appeals, arguing that the hearing officer is the sole judge of the weight and credibility of the evidence, and that the decision is supported by the record. Carrier 2 further concurs that neither carrier waived its right to dispute compensability, and that, as the claimant was not injured, he had no disability. Carrier 2 notes, however, that it is appropriate to end disability when a claimant represents in an application for unemployment benefits an ability to work. There is no response from the claimant to Carrier 1's cross-appeal.

DECISION

We affirm the hearing officer's decision on all appealed points.

The claimant said that in the summer of 1999 his sister-in-law, who was employed by the client company, a trash collection business, referred him to the client company for a job. He talked to Mr. P, who told him that their employees were hired through Company T. The claimant applied for employment with Company T and was sent back to the client company, where he became employed as a trash collector. He did not drive, but rode on the back of the trash truck. On _____, as he came around the back of the truck, the claimant said he was struck by another vehicle. He contended the vehicle did not brake, and was traveling 40 miles per hour. The police report indicated that the driver was told by the claimant that he was not hurt, and so he drove off, only to return later. The bumper hit the claimant's right knee, then his right hip hit the front of the vehicle and he fell down. The claimant said he got back up and retrieved a trash bucket from the curb and when he emptied it into the garbage truck, he realized he had hurt his back and asked the garbage truck driver to call an ambulance.

The claimant said he spent six hours at (the emergency room) and all that was done was a urinalysis and x-rays. The records indicate that his neck was not painful, that he had a normal lumbar examination, that the injury was a low-impact collision, and that he had some contusions on the back, knee, and hip. The record noted that the claimant initially refused to have the urinalysis and threw a clipboard to the floor. The claimant was prescribed Vicodin and was advised that he could resume normal activities after rest and elevation of the knee.

Two days later he consulted with family practitioner Dr. J, who told him he had pulled muscles but would be alright in a few days. There are no records of Dr. J in evidence. The claimant saw Dr. J two more times, and then transferred his care to a chiropractic clinic, where he was treated by Dr. F and Dr. H. The claimant's subsequent treatment, according to him, consisted of several months of adjustments and heat treatments. The claimant did not say what his diagnosis was, but said that he had neck muscle spasms and pain in his right knee and lower back. No surgery was performed. The claimant was able to resume his side lawn mowing business, which he had quit after his injury, sometime in spring 2000.

The ICD-9 codes on the Initial Medical Report (TWCC-61) filed by Dr. F on September 16, 1999, apply to cervical and lumbar strain, myalgia, and unspecified joint derangement. Dr. F issued off-work excuses through January 26, 2000. The claimant agreed he did not keep all appointments with the aforementioned doctors, contending that he lacked gasoline money to make the travel. He changed to Dr. M, a chiropractor, who was located in the town where the claimant lived. Dr. M saw the claimant first on February 4, 2000, and described the claimant's current complaints as "pain." The claimant was released to limited duty on April 10, 2000, and he said that it was after this that his lawn mowing was resumed.

Dr. M also ordered MRIs. An April 27, 2000, MRI of the right knee showed a partial tear of the posterior horn of the medial meniscus. A lumbar MRI taken on July 21, 2000, was reported as showing Grade I spondylolisthesis and a 2 mm annular bulge at L5-S1.

Mr. P testified that his company obtained its labor through Company T and other temporary companies. He was firm that his company would not have dealt with a company that did not have workers' compensation insurance, and stated that Company T represented to him that it did have workers' compensation insurance. Mr. P said that the details and direction came from him or the driver of the garbage truck, who was an employee of client company. Mr. P thought that Company T may have offered the claimant some general safety training, but the claimant said that no one trained him there. The skills needed for the job were walking down the street, picking up trash cans, and emptying them into the garbage truck. Mr. P was sure that there had been a written contract between his company and Company T, but all documents, he maintained, were lost when the client company was acquired by another enterprise.

The claimant was paid by Company T, which also handled income tax withholding. The claimant testified that he applied for unemployment compensation on December 9, 1999, and represented that he was able to work. The claimant said that he named Company T as his employer and that he never received any unemployment compensation. A decision dated December 7, 1999, from the Texas Workforce Commission (TWC) concerning payment of benefits states that benefits will be paid, and finds that the claimant was discharged from his last work due to a medically verified inability to work. This indicates that the claimant made a claim for benefits on November 14, 1999.

Much of the testimony at the CCH involved the relationships of Company T and similarly named companies that shared a phone line, building, officers, and directors, and employees. One of these companies was alleged to be insured for workers' compensation insurance through Carrier 2, but that company was not Company T. Ostensible officers and the bookkeeper for these companies who testified had surprisingly little concrete knowledge or recollection of matters that they would presumably know. The testimony was murky at best. The owner/president of Company T, Ms. F, actively disavowed the accuracy of official documents on file with the Comptroller of Public Accounts showing her as the registered agent for some of the related companies or showing the name of one of the affiliated companies, which she stated had never really existed. The supposedly erroneous name was nevertheless actively used for a time by an associated company. The hearing officer specifically noted that she found Ms. F's testimony unbelievable, and held that Company T was insured by Carrier 2 through its alter ego company. This has not been appealed.

Ms. F testified that there were no written contracts between Company T and the client company. She said that packets which were given to client companies made clear that work-related injuries were covered not under workers' compensation but an alternate accident plan. She further stated that if this plan did not pay medical bills for the claimant,

it was because he was not sending them to the accident insurance carrier. Ms. F said that Company T was not licensed as an employee leasing company.

Carrier 1 filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on October 19, 1999, contending that it first received written notice of injury on October 11, 1999. Carrier 2 filed its TWCC-21 on January 19, 2000, showing a date of written notice of January 13, 2000. No evidence was offered to show that the dates indicated for first receipt of written notice were in error.

WHETHER THERE WAS INJURY AND DISABILITY

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.- Amarillo 1980, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer could believe that the claimant was struck by a vehicle, and sustained some injury as detailed by Dr. F and Dr. H, but was not required to believe that the claimant was struck by a vehicle moving at 40 miles per hour. The injuries documented in the remaining reports of 1999 are relatively mild.

Furthermore, credibility of an injured worker may be considered by the hearing officer when an application is made for unemployment compensation with the representation that one may work. The hearing officer could conclude either that this was a truthful assertion at the time, or motivated by the desire to say what it takes to obtain payment of benefits, neither of which enhances credibility in this proceeding. We cannot agree that the TWC document is a certification of an inability to work at the time application for benefits was made, and it clearly refers back to the claimant's discharge. We would only note that the date that the hearing officer found an end to disability, December 7, 1999, which she stated was the date of application for unemployment benefits, was instead the date of dispute resolution by the TWC; the actual date of application was November 14, 1999. However, we will not disturb the hearing officer's findings, as she could conclude that it was in the course of dispute resolution that the claimant affirmed his ability to work. We find the determinations on injury and the period of disability sufficiently supported by the evidence.

TIMELY DISPUTE OF COMPENSABILITY

As noted in the hearing officer's decision, the Downs decision will not be applied to the claimant's case pending final resolution. The wording of Section 409.021(c) supports the 60-day waiver period, and Carrier 1 was well within this period. Carrier 2 disputed compensability even within the seven-day period according to dates established in this record.

WHETHER THE CLAIMANT WAS A BORROWED SERVANT OF THE CLIENT COMPANY

Whether or not the claimant was the nominal employee of Company T does not entirely resolve the issue of Carrier 1's liability. We have many times before cited the numerous Texas cases that stand for the doctrine that an employee of a general employer may become the borrowed servant of another special employer, and that this is a question of fact. Sparger v. Worley Hospital, Inc., 547 S.W.2d 582 (Tex. 1977). We would further note that the borrowed servant doctrine protects the employer who had the right of control over the manner and details of the employee's work from common-law liability. Carr v. Carroll Company, 646 S.W.2d 561, 564 (Tex. App.-Dallas 1982, writ ref'd n.r.e.).

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 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. We cannot agree with Carrier 1's assertion, unsupported by citation, that the purpose of this doctrine is to merely shift liability from uninsured employers onto insured employers.

The testimony in this case was extremely strong concerning the claimant's supervision by the client company as to the details of his work for which no special skill or training was required. No written contract reserving the right to control in Company T was produced. The hearing officer evidently concluded that Mr. P's oversight was more than the exercise of "general supervision" over the claimant's work, and her conclusion that the claimant was the borrowed servant of the client company is amply supported by the evidence.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this was the case here, and affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge