APPEAL NO. 011252
FILED JULY 19, 2001

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 May 14, 2001. With regard to the only issue before him, the hearing officer determined that the respondent (claimant) was employed by Employer G, insured for workers' compensation coverage by the appellant/cross-respondent, Carrier 1, on October 3, 2000.

Carrier 1 appealed, contending that the claimant was employed by Employer H, which had workers' compensation coverage with the respondent/cross-appellant, Carrier 2, citing a lease agreement between Employer G and Employer H and emphasizing facts which support its position. Carrier 2 also appeals, urging reversal of a finding of fact and our rendering of a new decision on that finding of fact. Both carriers respond to the other's appeal. The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant and another driver, BB, who has a companion case, were long distance truck drivers driving a tractor truck owned by Employer H and hauling a trailer owned by Employer G when they were involved in an out-of-state accident on _____. The testimony was largely undisputed. Employer G was a small business looking to expand without purchasing additional trucks or hiring drivers. Employer H was a trucking company that had extra trucks and the capability of hiring drivers. Employer G had interstate licensing and Department of Transportation (DOT) permits for trailers that it owned. Employer G and Employer H entered into an agreement whereby Employer H would furnish the truck and drivers, pay the drivers, and provide all fuel and expenses in exchange for 75% of the gross revenues of each trip booked by Employer G and hauled in Employer G's trailer with Employer G's permits and licenses. Employer G administered the driving tests to Employer H's drivers and approved drivers which hauled Employer G's trailers. The claimants were hired by Employer H, with approval by Employer G, and were paid by Employer H. In evidence is a lease agreement between Employer G and Employer H, which in pertinent part states:

> (3) During the tenure of this lease agreement, the [Employer G] shall have exclusive possession, control, and use of the equipment, and shall assume complete responsibility for the operation of the equipment for the duration of the lease. [Employer H] agrees to properly identify equipment with Federal Highway Administration's "MC" number and the name of [Employer G].

(13) It is agreed that the services of [Employer H] under the terms of this lease agreement is that of an independent contractor and that no "employee-employer" relationship exists between [Employer H] and [Employer G]. [Employer H] is therefore responsible for providing his own workman's compensation insurance, employment and income taxes, etc. Further, any drivers or employees of [Employer H] are the complete responsibility of the [Employer H].

Each carrier contended that under portions of the lease agreement, the other insured employer exercised direction, control, and supervision of the other insured employer. The hearing officer, in his Statement of the Evidence, commented:

> In addition, the lease between [Employer G] and [Employer H] was not dispositive as to [who] had the right of control of Claimant and Claimant [BB].
>
> The summary of the evidence clearly indicated that after being dispatched by [Employer G], Claimant and Claimant [BB] were delivering a load for [Employer G], were directed by [Employer G] where to pick up the load, and were directed by [Employer G] where to deliver the load. In addition, [Employer G] screened and tested the drivers submitted by [Employer H], and [Employer G] could hire and fire the drivers hauling their loads under their directions. In his uncontroverted testimony, [Employer H's owner] testified that after Claimant and Claimant [BB] got into the tractor-trailer rig and departed [Employer H] premises, Claimant and Claimant [BB] were under the control of [Employer G].

The hearing officer also made the following appealed finding of fact:

> 3. The written lease agreement between [Employer G] as lessee, and [Employer H], as lessor, dated July 14, 2000, did not assign the right of control of Claimant and Claimant [BB].

Carrier 1 appealed, reciting Employer H's responsibilities, compared to Employer G's responsibilities under the lease, citing the definition of an independent contractor (which Carrier 1 asserts Employer H was) and asserting that the claimants were not borrowed servants of Employer G and that Employer H had the right of control. Carrier 1 cites Texas Workers' Compensation Commission Appeal No. 990686, decided May 19, 1999, and Texas Workers' Compensation Commission Appeal No. 990695, decided May 19, 1999, also companion cases involving who the employer was on the date of the accident. In those cases, the Appeals Panel affirmed the hearing officer's decision, as we are doing in this case, stating:

> 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, and that this is a question of fact. Sparger v. Worley Hospital, Inc., *et al.*, 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, 563 (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. Haliburton v. Texas Indemnity Insurance Company, 213 S.W.2d 677, 680 (Tex. 1948).

We do not disagree with the propositions cited in Appeal Nos. 990686 and 990695 and only point out that the interpretation of the facts and who actually had the right to control, direct, and supervise the claimants at the time of the accident is largely a factual determination for the hearing officer to resolve.

Similarly, with regard to Carrier 2's appeal requesting that we reverse Finding of Fact No. 3, quoted above, we conclude that the hearing officer did not err in finding that clause 3 of the lease agreement did not clearly assign who had the right of control over the claimants in this situation in that that clause deals with the control, use, and operation of the equipment during the duration of the lease.

We have reviewed the complained-of determinations and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, we affirm the hearing officer's decision and order.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge