APPEAL NO. 012048
FILED OCTOBER 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 August 9, 2001. With respect to the single issue before her, the hearing officer determined that (employer 1) was the respondent's (claimant) employer on _____, for purposes of the 1989 Act. The parties stipulated that on the date of injury, employer 1 had workers' compensation insurance with the appellant, (carrier 1). In its appeal, carrier 1 contends that (employer 2), who had workers' compensation insurance with (carrier 2), was the claimant's employer on the date of injury. The appeal file does not contain a response to carrier 1's appeal from either carrier 2 or the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained an injury in the course and scope of his employment on _____, when he was struck by an automobile while removing warning cones from a roadway. It is undisputed that the claimant was working on a job site of employer 1 at the time of his injury. The only issue is whether employer 1 or employer 2 was the claimant's employer at that time for purposes of the 1989 Act. The evidence established that the owners of employer 1 and employer 2 had a personal relationship; that the two companies were in the same business, road construction; and that on occasion the companies would loan each other laborers. In _____, the claimant, who was an employee of employer 2, was loaned to employer 1. The claimant remained on the payroll of employer 2, and employer 1, as the borrowing employer, reimbursed employer 2 for the costs of salary, taxes, and insurance, including workers' compensation insurance, for the work the claimant performed at employer 1's job site. The evidence also established that employer 1 had control over the claimant's work duties and location, that employer 1 transported the claimant to the job site on the date of the injury, and that employer 1 provided the necessary materials and tools to perform the work. In addition, the supervisor of the project where the claimant was working at the time of his injury was an employee of employer 1.

As noted above, the hearing officer determined that the claimant was a borrowed servant of employer 1 at the time of his injury and that, as such, employer 1 was his employer for purposes of the 1989 Act. Carrier 1 initially argues that the hearing officer erred in determining that employer 1 was the claimant's employer for purposes of workers' compensation because employer 1 and employer 2 had an oral agreement whereby employer 2 retained the right of control over the claimant. A review of the hearing officer's decision makes clear that she, as the fact finder, was not persuaded that such an agreement existed between employer 1 and employer 2. Nothing in our review of the record reveals that the hearing officer's determination in that regard is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound

basis exists for us to reverse her determination that employer 1 was the claimant's employer at the time of his injury. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Carrier 1 also argues that the facts establish that employer 2 had the right of control over the claimant at the time of his injury. We find no merit in this assertion. The evidence established that employer 1's supervisor at the job site directed all aspects of the claimant's employment on the date of injury; that it provided the claimant with tools and materials; that employer 2 did not have any input as to the work to be performed by the claimant on the date of injury; that employer 2 did not receive any pecuniary gain from lending its employees to employer 1; and that the claimant was not in the general performance of his duties for employer 2 when he was performing similar duties for employer 1. In Esquivel v. Mapelli Meat Packing Co., 932 S.W.2d 612, 614 (Tex. App.-San Antonio 1996, writ denied), the court stated:

> To ascertain whether, an employee, who has been loaned to another, is the employee of the original employer or the borrowing employer, the test is whether the employee is subject to the specific direction and control of the loaning or the borrowing employer. *Hilgenberg v. Elam,* 198 S.W.2d 94, 95 (Tex. 1946). The governing inquiry in the "borrowed servant" context is which employer, the general or the special, controlled the "very transaction out of which the injury arose." *See Id.*

Applying that test, the hearing officer determined that employer 2 had the right of control over the claimant at the time of his injury. That determination is supported by sufficient evidence and nothing in our review of the record reveals that the challenged determination is so contrary to the great weight of the evidence as to compel its reversal. Pool, *supra.*

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **NATIONAL FIRE INSURANCE COMPANY OF HARTFORD** and the name and address of its registered agent for service of process is

C T CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge