

APPEAL NO. 021580  
FILED AUGUST 8, 2002

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 13, 2002, with the record closing on May 24, 2002. The disputed issues that follow were before the hearing officer for resolution:

1. Was [Employer 1] or [Employer 2] the [respondent] Claimant's employer for the purposes of the Texas Workers' Compensation Act at the time of the claimed injury?
2. Has [Appellant/Cross-Respondent] Hartford Underwriters [Carrier 1] waived its right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Texas Labor Code §409.021?

Pertinent to the appeals before us are the following factual findings and legal conclusions, together with the decision and order, all as stated in the hearing officer's Decision and Order of May 31, 2002.

**FINDINGS OF FACT**

2. On \_\_\_\_\_, [Employer 2] had the right to control the details of Claimant's work.
3. On \_\_\_\_\_, [Employer 2] exercised actual control over the details of Claimant's work.
4. At the time of her injury, Claimant was engaged in an activity that had to do with, originated in and furthered the affairs or business of [Employer 1].
5. [Carrier 1] received written notice of Claimant's injury on \_\_\_\_\_.
6. [Carrier 1's] contest of compensability filed on January 28, 2002, was not based upon newly discovered evidence that could not reasonably have been discovered at an earlier date.

**CONCLUSIONS OF LAW**

3. [Employer 1] and [Employer 2] were Claimant's co-employers at the time of the claimed injury.

4. [Carrier 1] waived its right to contest compensability of the claimed injury by not so doing in accordance with Texas Labor Code § 409.021.

### **DECISION**

[Employer 1] and [Employer 2] were Claimant's co-employers at the time of the claimed injury. [Carrier 1] waived its right to contest compensability of the claimed injury by not so doing in accordance with Texas Labor Code §409.021.

### **ORDER**

Each Carrier is ordered to pay benefits in accordance with this decision, the Texas Workers' Compensation Act and the [Texas Worker's Compensation] Commission's Rules.

Carrier 1, which provided workers' compensation for Employer 1, has requested review asserting, first, that the hearing officer erred in keeping the record open after the hearing and admitting into evidence two additional exhibits from Respondent/Cross-appellant Insurance Company of the State of Pennsylvania (Carrier 2) without giving Carrier 1 the opportunity to comment. Carrier 1 also challenges the sufficiency of the evidence to support Findings of Fact Nos. 4, 5, and 6; Conclusions of Law Nos. 3 and 4; and so much of the "Decision" and "Order" as determines that Employer 1 was a coemployer. Carrier 1 requests that we reverse and render a new decision determining that Employer 2 was the claimant's employer on the date of the injury, that Employer 1 was not a coemployer, and that Carrier 1 did not waive its right to contest the compensability of the injury. Carrier 2, which provided workers' compensation for Employer 2, has filed "a limited appeal seeking clarification of the Order" and asserts that Carrier 1 has construed the Order as splitting the liability between the two carriers and is paying only 50% of the claimant's benefits. Carrier 2 has filed a response to the appeal of Carrier 1, contending that the hearing officer did not err in keeping the record open and admitting the two additional exhibits because Carrier 1 was not only aware of the existence and content of the two exhibits, but had itself introduced an incomplete copy of one of the exhibits. Carrier 2 further responds that the evidence and law support the determination that, at the time of the injury, Employer 1 and Employer 2 were coemployers of the claimant, and that the evidence sufficiently supports the determination that Carrier 1 waived its right to contest the compensability of the claimed injury. The record does not contain a response from the claimant. Findings of Fact Nos. 2 and 3, which support the conclusion that Employer 2 was an employer of the claimant at the time of the injury, have not been appealed.

### **DECISION**

Affirmed as reformed.

As the hearing officer noted, the essential facts in this case are not in dispute. According to the claimant, while working on a product assembly line at Employer 2's plant on \_\_\_\_\_, she sustained multiple injuries in a horrific accident when, after bending down to pick up a dropped product component off the floor, her hair got caught in the moving parts of the product assembly line conveyor and her scalp was ripped from the crown of her head. According to the documentary evidence, the claimant was hired by Employer 1 sometime in October 1998; was assigned by Employer 1 to work at one of Employer 2's plants on October 21, 1998; and was paid by Employer 1, apparently from payments received from Employer 2. Employer 1 had previously provided Employer 2 with a Certificate of Insurance reflecting that Carrier 1 was providing workers' compensation insurance for its employees assigned to work at Employer 2's facilities. There was no evidence that Employer 1 was issued a license pursuant to the Staff Leasing Services Act, TEX. LAB. CODE ANN. § 91.001 *et seq.*, nor is there evidence that Employer 1 was issued a license pursuant to Chapter 92 of the Texas Labor Code pertaining to employers of temporary common workers. In his affidavit of December 1, 2000, Mr. L, the president of Employer 1, stated that Employer 1 assigned the claimant to work for Employer 2 effective October 21, 1998, to \_\_\_\_\_, the date of her accident; that both employers had workers' compensation insurance for their employees; that the claimant received workers' compensation benefits as a result of the injury incurred while in the course and scope of her temporary employment with Employer 2; that Employer 1 did not provide any tools, manuals, or equipment for the claimant's use with Employer 2; that Employer 1 did not control the claimant's work hours and breaks, nor provide any supervision of her job performance; and that the aforesaid matters were left to the direction and control of Employer 2. In her affidavit of December 1, 2000, Ms. E, the employment manager for Employer 1, repeated some of the same statements contained in Mr. L's affidavit. She stated that Employer 2 provided the claimant with all the tools, equipment, and instruction necessary for the performance of her job there; that the claimant took no instructions from Employer 1; that Employer 2 controlled the details of the claimant's work and had control of the premises where the accident occurred; and that Employer 2 provided all necessary instruction, training, and supervision of the claimant. In her affidavit of April 9, 2002, Ms. E stated that "[Employer 1] represented that it carried workers' compensation insurance which covered all persons they placed to work at [Employer 2] and [Employer 1] provided a certificate of workers' compensation insurance to verify that they had this insurance coverage for the persons they had working at [Employer 2]." Attached to this affidavit is a September 19, 1997, letter from Mr. L to Ms. E confirming wage rates for the 1998 season at three of Employer 2's locations; two certificates of insurance; a single page with Employer 2's "pay rates/bill rates"; a two-page document entitled "[Employer 2/Employer 1] Staff Management Partnership"; a three-page document entitled "[Employer 2] Service meeting"; and a one-page document entitled "Employee Injury Procedures." Also in evidence are the claimant's personnel records from Employer 1. None of these documents specifically address the right to control the claimant's activities at Employer 2's plant, nor do they specifically address the status of Employer 1 and Employer 2 as coemployers.

Carrier 1 stated in an interrogatory answer that it received written notice of the claimant's injury on \_\_\_\_\_. Carrier 1 is shown as a recipient of the January 19, 1999, accident report performed for Employer 2. The documentary evidence indicates that Carrier 1 apparently commenced the payment of workers' compensation benefits to the claimant on or about January 8, 1999. The documentary evidence further reflects that on or about May 12, 2000, the claimant filed a negligence suit against Employer 2; that on or about December 18, 2000, Employer 2 filed a motion for summary judgment, asserting that on the date of the claimant's injury she was its employee under the "borrowed servant" doctrine; that on or about January 3, 2001, the claimant amended her pleading to join Employer 1 as a defendant; that on or about January 6, 2001, she added the manufacturer and distributor of the conveyor equipment as defendants; that on February 19, 2001, a district court judge signed an order granting Employer 2 summary judgment; and that on January 28, 2002, Carrier 1 filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) which stated that "[b]ased on newly discovered evidence, there is no coverage for [Employer 2] employees under Policy [policy number]. Injured worker is an employee of [Employer 2]."

On May 17, 2002, prior to closing the record on May 24, 2002, the hearing officer admitted into evidence a copy of Carrier 2's Exhibit No. 14, Employer 1's Motion for Summary Judgment, filed in the claimant's negligence suit on December 4, 2001, and a copy of an Order, signed by another district court judge on January 30, 2002, granting Employer 1's motion for summary judgment. Employer 1's motion stated three grounds for summary judgment against the claimant, to wit: (1) the claimant's common-law claims against Employer 1 are barred by the Huckabee estoppel doctrine (The Lomas & Nettleton Company v. Huckabee, 558 S.W.2d 863 (Tex. 1977)) because she has recovered workers' compensation benefits from Employer 1 on the basis of being the employee of Employer 1 while seeking to recover common-law damages from Employer 1 on the theory that Employer 1 was not her employer at the time of the injury; (2) the claimant's common-law claims are barred by the election of remedies doctrine, namely, her suit to recover such damages from Employer 2; and (3) the claimant's common-law claims are barred by the 1989 Act because, notwithstanding that she did become the "borrowed servant" of Employer 2, she remained an employee of Employer 1, and thus Employer 1 and Employer 2 were her coemployers, despite the inapplicability in this case of the Staff Leasing Services Act. The hearing officer also admitted at this time Carrier 2's Exhibit No. 15 consisting of (1) a copy of an Order, signed by a district court judge on January 30, 2002, which simply grants Employer 1's Motion for Summary Judgment without comment and (2) the affidavit of Mr. L, the owner of Employer 1.

Carrier 1 contends on appeal that the hearing officer erred in admitting these two exhibits for the reasons that (1) the record was to be left open only until May 17, 2002, and over the objection of Carrier 1, for the purpose of receiving the closing statement of Carrier 2, whose representative was not prepared to make such statement on May 13, 2002; (2) because Carrier 1 was not provided an opportunity to resist the admission of these exhibits; and (3) because these exhibits, having been filed in the claimant's negligence suit, were in the public domain and available to Carrier 2 before the hearing

closed on May 13, 2002. Responding that no reversible error was committed in the admission of these exhibits, Carrier 2 points out that the record was not closed until May 24, 2002; that only a partial copy of Carrier 1's Exhibit No. 14 was introduced into evidence by Carrier 1 at the hearing; and that since Employer 1 is a party to the negligence suit, Carrier 1 had knowledge of the existence and content of both exhibits. Neither the hearing officer's Decision and Order nor the hearing record contain any explanation as to why these exhibits were not timely exchanged by Carrier 2, nor are we favored with any indication by the hearing officer as to his finding good cause to nevertheless admit them. See Sections 410.151 through 410.158 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(3) (Rule 142.13(c)(3)). The Appeals Panel has repeatedly urged hearing officers to ensure that hearing records reflect that "good cause" findings were made. See, e.g., Texas Workers' Compensation Commission Appeal No. 91064, decided December 12, 1991, and Texas Workers' Compensation Commission Appeal No. 011210, decided July 10, 2001. Having reviewed these two exhibits, we conclude that any possible error in their admission was not reasonably calculated to cause and did not probably cause the rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

With regard to the Section 409.021(c) waiver issue, we are satisfied that Finding of Fact Nos. 5 and 6 are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). As the hearing officer quite correctly indicates, Carrier 1 had notice of the accident the day it happened and was shown as a recipient of the accident report of January 19, 1999. Carrier 1 did not have to wait until it learned of the summary judgment order during a mediation in December 2000 to investigate the potential defense concerning the identity of the claimant's employer for workers' compensation purposes. Finding of Fact Nos. 5 and 6 adequately support Conclusion of Law No. 4.

The only factual finding to support the conclusion that Employer 1 was a coemployer of the claimant on \_\_\_\_\_, is Finding of Fact No. 4. While it was the business of Employer 1 to provide Employer 2 with temporary staffing when needed, only in an indirect sense can it be said that the claimant's work on Employer 2's production line on \_\_\_\_\_, had to do with, originated in, and furthered the affairs or business of Employer 1. None of the several documents in evidence relating to the provision by Employer 1 of employees to Employer 2 provided that Employer 1 retained the right to control the claimant's work activities at Employer 2's plant. The Texas law on this matter is succinctly stated in Archem Company v. Austin Industrial, Inc., 804 S.W.2d 268 at 269-270 (Tex. App.-Houston [1st Dist.] 1991, no writ), as follows:

Under Texas Workers' Compensation Law, the entity with the "right to control" the employee at the time of the accident is the "employer" for workers' compensation purposes. [Citation omitted.] An employee in the general employment of one employer may be temporarily loaned to

another so as to become a special or borrowed employee of the second employer. [Citation omitted.] Whether a person is an “employee” of the general employer or the special employer to whom he is loaned is determined by which employer had “control” of the “manner of performing [his] services.” [Citation omitted.] Where one entity “borrows” another’s employee, workers compensation law identifies one party as the “employer” and treats all others as third parties. [Citation omitted.]

If a contract between a general and special employer expressly provides that one party has the “right to control” the employee, then that employer is liable for workers’ compensation benefits and is entitled to the [1989] Act’s protection from liability for negligence. [Citations omitted.] Absent a specific contract between a general and special employer, however, courts review the facts of each case to determine which entity had the “right to control” the employee’s activities. [Citation omitted.]

The court in Archem went on to mention a number of cases where the contracts or other documents in evidence were found insufficient to establish a right of control. The court described the contract before it as “little more than a fee schedule” and stated that because it lacked an express provision regarding the right to control, it is not dispositive and the facts must be reviewed to determine who possessed the right to control the injured employee’s work.

In Brown v. Aztec Rig Equipment, Inc. and Administaff, Inc., 921 S.W.2d 835 (Tex. App.-Houston [14th Dist.] 1996, writ denied), the court affirmed the lower court’s granting of the motions of Aztec, which leased employees from Administaff, for summary judgment, holding that the two entities were coemployers of the claimant at the time of his work-related injury and that both were entitled to the “exclusive remedy” provision of the 1989 Act. In that case, however, Client Service Agreements between the two entities required Administaff to provide workers’ compensation coverage for all employees furnished to Aztec and expressly provided that the two entities are coemployers for purposes of workers’ compensation. Further, the uncontroverted summary judgment proof established that Administaff purchased workers’ compensation insurance using the service fees paid by Aztec. The court’s decision summarizes a number of cases in which both the company providing the injured employee and the company using the labor of the injured employee were found to be entitled to the “exclusive remedy” provision of the 1989 Act because the company using the injured worker had arranged to have its workers’ compensation coverage provided by the company that provided the worker. *And see Williams v. Brown & Root, Inc.*, 947 S.W.2d 673, 677 (Tex. App.-Texarkana 1997), a case involving the injured employee of a subcontractor, wherein the court, referring by analogy to employee-lease cases, stated that “invariably, the second company is immune because it has contractually arranged for the first company to provide workers’ compensation coverage”; that “it does not matter that the second company does not pay directly for the coverage”; that “there is ‘no reason why an employer cannot contractually provide for payment of premiums on his employees by a third-party acting on his behalf’”; and that “the manner

in which the insurance is paid is immaterial, so long as there is a compensation policy in force.”

The Appeals Panel has recognized that there can be co-employment of an injured worker. In Texas Workers' Compensation Commission Appeal No. 962340, decided January 2, 1997, we affirmed the decision of the hearing officer, who determined that the deceased employee was the employee of both the trucking company that owned the truck he drove and the trucking company that leased the truck with driver. Notwithstanding that the lease agreement stated that the deceased employee would be the exclusive employee of the lessor company, the hearing officer found that the lessee company had workers' compensation with the one carrier who was a party in that case; that both companies had the right to hire and fire the deceased employee; that both companies had joint control over the deceased employee on the date of injury; that the deceased employee worked for both companies; and that the deceased employee had only one job at the time of his death and received wages from both companies. We regard these facts as distinguishing this case from the one we here consider.

In Texas Workers' Compensation Commission Appeal No. 011605, decided August 29, 2001, also a case in which the Staff Leasing Services Act did not apply, we affirmed the hearing officer's determination that at the time of his compensable injury the employee was co-employed by (Employer A) and (Employer B). There was no appeal of the determination that the employee was the employee of Employer B when injured. Our decision noted precedent in Appeals Panel decisions (Texas Workers' Compensation Commission Appeal No. 981848, decided September 21, 1998; Texas Workers' Compensation Commission Appeal No. 002414, decided November 16, 2000), and in Texas Law (Brown, *supra*), for allowing co-employment in certain instances, and referred to the Brown decision as embodying a common-law “co-employment doctrine.” However, the decision in Appeal No. 011605, *supra*, states that the agreement between the two employers provided that the employee was to be an employee of Employer A and was to be covered by Employer A's workers' compensation insurance. In Appeal No. 981848, *supra*, the Appeals Panel reversed a finding that the Staff Leasing Services Act applied and remanded for a determination as to whether the temporary staffing company or the plant where the employee worked was the employer. In Appeal No. 002414, *supra*, the contract between the two employers specified that the company providing the employee retained the right of control over the employee's activities and actually provided a supervisor on the production line at the plant.

From these decisions it can be seen that, aside from the Staff Leasing Services Act, two business entities can specifically provide by contract for the employee of one to be coemployed by the other and the using entity can provide workers' compensation coverage for such employee through the workers' compensation coverage of the entity providing the employee. However, the coemployment arrangements in these cases were evidenced by written contracts and, as we have noted, the documents in this case do not specifically provide for either the retention of control by Employer 1 or the establishment of a coemployer relationship between Employer 1 and Employer 2, the

employer at the time of the injury. In the case we consider, the documents in evidence did not require Employer 1 to provide workers' compensation coverage for employees assigned to work for Employer 2 nor did they provide that Employer 1 and Employer 2 were coemployers, nor did they provide that Employer 1 retained the right to control the claimant's activities with Employer 2. While Employer 1 did provide Employer 2 with a Certificate of Insurance, as the Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 93365, decided June 25, 1993, "[w]e have stated several times before that the mere recital or claim by a party to be the 'employer,' or the gratuitous provision of workers' compensation insurance, does not conclusively resolve the issue of who is the 'employer' for purposes of workers' compensation. [Citations omitted.]"

There is another basis, however, for affirming the hearing officer's determination that Employer 1 and Employer 2 were coemployers of the claimant at the time of her injury and that is the judicial admission of Employer 1. In our view, Employer 1's summary judgment motion, supported by the affidavit of Mr. L, quite clearly constitutes a judicial admission that the claimant remained the employee of Employer 1 while working at Employer 2's plant where she became the "borrowed servant" of Employer 2. Accordingly, we do not find the hearing officer's determination that Employer 1 and Employer 2 were the coemployers of the claimant at time of her injury to be against the great weight of the evidence. King's, *supra*; Cain, *supra*.

We affirm the challenged findings of fact and conclusions of law as well as the hearing officer's "Decision." We do, however, reform the hearing officer's "Order," which orders "each carrier" to pay benefits in accordance with the hearing officer's decision, the 1989 Act, and the rules of the Commission, to provide that Carrier 1 is ordered to pay the claimant's workers' compensation benefits in accordance with this decision, the 1989 Act, and the Commission's rules.

The true corporate name of insurance carrier 1 is **HARTFORD UNDERWRITERS INSURANCE COMPANY** 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.**

The true corporate name of insurance carrier 2 is **THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
800 BRAZOS, SUITE 750, COMMODORE 1  
AUSTIN, TEXAS 78701.**

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

CONCURRING OPINION:

I agree, but write separately because I differ a little with the majority opinion's view that there are no documents in evidence requiring Carrier 1 to cover employees assigned to Employer 2. To the contrary, that is in my opinion what the policy and the certificate of coverage in evidence indicates. Moreover, the insurance policy in evidence shows that Carrier 1 knew or should have known exactly what the business of its insured, Employer 1, was, and that it collected a six-figure premium to confer the very coverage which it now seeks to avoid. I believe that the hearing officer may infer the existence of a contract that may not have been reduced to "four corners" formality.

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Susan M. Kelley  
Appeals Judge