

APPEAL NO. 030146
FILED FEBRUARY 26, 2003

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 December 17, 2002. The hearing officer determined that respondent 1/cross-appellant's (claimant) employer for purposes of the 1989 Act at the time of the claimed injury was (Company 1); that the claimant sustained a compensable injury on _____; that the claimant had disability due to his injury beginning on September 11, 2001, and continuing through the date of the CCH; that the claimant timely notified his employer of his injury; and that respondent 2 (carrier 2) (carrier for employer (Company 2) waived the right to contest compensability of the injury. The appellant/cross-respondent (carrier 1) appeals, contending that for purposes of workers' compensation, (Company 2) was the claimant's employer; that the claimant failed to timely notify (Company 1) of the alleged injury; and that the hearing officer erred in determining that carrier 2 is not liable for benefits because the hearing officer determined carrier 2 waived the right to contest compensability. Carrier 1, in its appeal, otherwise urges affirmance of the hearing officer's determinations that carrier 2 waived the right to dispute compensability of the injury. The claimant responds urging affirmance, but in the alternative conditionally appeals, requesting that we determine that the claimant was an employee of (Company 2) in the event that the Appeals Panel determines the claimant's supervisor who was given notice of the injury was an employee of (Company 2). Carrier 2 responds to the appeals urging affirmance of the determination that (Company 1) was the employer for purposes of workers' compensation coverage.

The hearing officer's determinations that the claimant sustained a compensable injury on _____; that the claimant had disability beginning on September 11, 2001, and continuing through the CCH; that carrier 2 has waived the right to contest compensability of the injury; and that carrier 1 has not waived the right to contest compensability of the claim have not been appealed and have become final. Section 410.169

DECISION

Reversed and rendered.

The hearing officer determined that (Company 1) was the claimant's employer for purposes of workers' compensation. The claimant testified that although initially he thought he was an employee of (Company 1), he believed (Company 2) employed him. The claimant testified that he heard (Company 2) was hiring mechanics so he applied for the job; he was told that a background check had to be completed before he could work for (Company 2); a field superintendent for (Company 2) told him to go apply at (Company 1) so they could hire him and put him to work on a (Company 2) crew; that prior to applying with (Company 1) he was required to take a safety class by (Company

2); that he was told by (Company 2) to submit his time for the safety class to (Company 1) and he would be paid for his time; his supervisor, (RW), was an employee of (Company 2); that RW exercised the right of control over the claimant, telling the claimant what to do; that if the claimant had questions about his work he would ask RW; that (Company 2) provided all of the tools for the claimant; that (Company 2) told the claimant to wear special safety clothes; and that when (Company 2) received the claimant's background check on September 11, 2001, a (Company 2) field superintendent called the claimant to the office, terminating the claimant and telling him to go pick up his paycheck. A printed statement by RW states in part, "[the claimant] was working for [(Company 1)] contracted out to (Company 2). . ." The evidence also established that although (Company 1) paid the claimant, (Company 2) reimbursed (Company 1) for all wages paid to the claimant and for the money paid to the claimant for attending the safety class.

Texas courts have recognized that a general employee of one employer may become the borrowed servant of another employer. The determinative question then becomes which employer had the right of control of the details and manner in which the employee performed the necessary services. Carr v. Carroll Company, 646 S.W.2d 561 (Tex. App.-Dallas 1982, writ ref'd n.r.e.). 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.]

Although the claimant was paid by (Company 1) he was temporarily loaned to (Company 2) until the background check was completed. We conclude that the hearing officer erred in not applying the right-of-control test and in determining that, at the time of the injury, the claimant was the employee of (Company 1). There is little doubt that (Company 2) was the entity with the right of control at the time of the accident. In addition to the fact that a (Company 2) employee, RW, was the claimant's supervisor and controlled the details of the claimant's work, the evidence demonstrated that a (Company 2) field superintendent terminated the claimant's employment after receiving the background check. Consequently, for purposes of workers' compensation, (Company 2), (who had workers' compensation coverage with carrier 2), was the employer.

Regarding timely notice to the employer, it was undisputed that the claimant told his supervisor RW in a timely manner about the injury and that RW took the claimant to seek medical care. Further, the carriers do not contend on appeal that the claimant was not injured in the course and scope of his employment. To the extent that carrier 1's appeal can be construed as an appeal of the determination that the claimant sustained a compensable injury, because of its challenge to Conclusion of Law No. 6 (regarding timely notice to the employer), we conclude that the hearing officer's determination that the claimant sustained a compensable injury is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer determined that carrier 2 waived the right to contest compensability of the alleged injury. That determination was not appealed, therefore, carrier 2 is responsible for payment of benefits as a matter of law. In summary, because we reverse the hearing officer's determination that (Company 1) was the employer for purposes of workers' compensation and render a new decision that (Company 2) was the employer, carrier 1, who is the carrier for (Company 1), has no liability for this claim. Carrier 2, who had coverage for (Company 2), is ordered to pay workers' compensation benefits to the claimant as required by the 1989 Act.

The true corporate name of insurance carrier 1 is **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION for Petrosurance Casualty Company, an impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLY, EXECUTIVE DIRECTOR
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

The true corporate name of insurance carrier 2 is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**BEN SCHROEDER
ZURICH NORTH AMERICA
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Roy L. Warren
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Robert W. Potts
Appeals Judge