APPEAL NO. 92039

On October 16, 1991, a contested case hearing was. The (hearing officer) found that (Mr. KB), the respondent herein, was injured in the course and scope of his employment as a truck driver on _____, and was an employee of (trucking company) on that date. The trucking company's insurance carrier was ordered to pay benefits to respondent.

The insurance carrier, appellant herein, appeals the determination that the respondent was an employee of employer, rather than an employee of ("leasing company"). The appellant argues that a contract between the trucking company and the leasing company is conclusive on the issue of right of control over respondent, and that the hearing officer erred by going behind the contract and considering evidence of exercise of control over respondent. Alternatively, the appellant urges that the decision of the hearing officer is erroneous, based upon insufficient evidence, and against the great weight and preponderance of the evidence.

DECISION

We affirm the decision of the hearing officer, finding neither mistake of law nor insufficiency of evidence in his determination. The sole issue in this case is whether the respondent was an employee of the trucking company, covered by workers' compensation insurance, or of the leasing company, a non-subscriber, at the time of his injury.

(Mr. KB), the respondent, was a truck driver who suffered an injury to his foot on _____, while loading a drill collar onto his delivery truck on a haul for ("trucking company"), a (City 1), Texas, company that is regulated as a carrier by the Texas Railroad Commission. It is undisputed that he was injured in the course and scope of employment as a truck driver.

On December 27, 1990, respondent applied for a job with the trucking company as a driver and was, according to the testimony, hired forthwith by ("Mr. H"), the general manager of the trucking company. He had previously been employed by another corporation owned by Mr. L. From that date through the date of his injury, Mr. KB was never terminated by the trucking company, nor did he apply for a job with any leasing company. He stated that it was not until after his injury that he was told that he was an employee of leasing company. Leasing company is in the business of employee leasing. He acknowledged receiving paychecks printed with leasing company's name, but said he never paid that much attention to the checks other than the amount.

Respondent testified that his job did not change in the time he worked for the trucking company. He stated that he regarded Mr. H, the general manager of the trucking company, as the person to whom he answered. Respondent identified ("Ms. Z") as an employee of the trucking company who did some dispatching.

Respondent said that on the day he was hurt, he received instructions from Mr. H telling him that he would be driving to (City 2), and instructing him to get the paperwork from Ms. Z. The "paperwork" consisted of waybills and delivery papers and directions on getting to his destination. He said that Mr. H had told him that he would be picking up drilling pipe, and told him the building name of his destination. Respondent testified that generally in his employment Ms. Z would give him more specific directions, but that there would not always be paperwork required.

On _____, respondent noted that the tires were bad on the truck he was to take, so Mr. H obtained another truck for him. Ms. Z had nothing to do with this change. When he arrived at his destination, he stated that he called Mr. H to verify the size of the drill collar he was to pick up.

Respondent stated that it was his understanding he was employed by the trucking company, and that the company had workers' compensation insurance. He stated that in January of 1991, he had driven a truck to (City 3) for the trucking company.

Mr. H testified that he had worked for the trucking company since 1983, and generally oversaw the operation and solved problems that came up. He handled everything from customer relations to buying trucks. He identified Ms. Z as the company's office manager until on or about January 12, 1991, when she became an on-site supervisor for the leasing company. In addition to her duties as supervisor, Mr. H stated that she performed secretarial work for trucking company. He said that he never worked for the leasing company. He stated that the trucking company was a regulated motor carrier by the Texas Railroad Commission, under a certificate of public necessity issued by the commission. He further stated that federal law required drug testing of persons working on their premises.

Mr. H said that on January 12, 1991, the trucking company signed a contract with the leasing company. He stated that he had hired respondent before this date, and that respondent was not terminated from the trucking company after December 27, 1990, nor was he asked to reapply to the leasing company. He stated that the trucking company, after January 12, 1991, had some employees that were theirs and some that were the leasing company's. He said that on this date, Ms. Z "became" a representative of the leasing company. Mr. H stated that after January 12, 1991, the leasing company started issuing paychecks to respondent and handling his withholding. It was Mr. H's understanding that the leasing company was to supply major medical insurance for leased employees, but not workers' compensation insurance.

Mr. H stated that there was an "informal" meeting at the shop when the leasing company took over. He said that after the date of the lease, he was responsible for initial interviews of job candidates, to determine skills and qualifications, and he then turned candidates over to Ms. Z for later processing, background checks and interviewing. If an

employee was unsatisfactory, ("Mr. L"), Ms. Z and he would have a meeting to discuss what to do. If an employee was a leased employee, the termination would be handled by Ms. Z or ("Ms. S") who worked at the leasing company.

Mr. H pointed out that their job applications do not list any company name. He confirmed that his basic job did not change in a major way, with only minor changes relating to the interviewing process. He stated that Ms. Z makes final hiring decisions. Mr. H related one occasion where trucking company paid respondent when leasing company underpaid him, and said that leasing company reimbursed them.

Ms. S, the president of the leasing company, confirmed that respondent was already an employee of the trucking company on January 12, 1991, the date of the lease agreement. She stated that she met with Mr. L, Mr. H and Ms. Z to discuss who would come to work for the leasing company. She stated that in hiring respondent she "took the application that was there" because it supplied all needed information. However, she eventually confirmed in cross-examination that respondent did not place another employment application with the leasing company, although she stated that his December 27, 1990 application was "not necessarily" a trucking company application. She states that she never met personally with respondent to tell him he was working for leasing company. She stated that there was an informal meeting at the shop, as well as a safety meeting at a restaurant, with employees stationed at the trucking company. She stated that Ms. Z was the only leased employee of approximately 15 persons at the trucking company, who served in an administrative capacity. She characterized Ms. Z as her "agent." She stated that her company runs newspaper ads and also uses "word-of-mouth" to recruit employees. Ms. S testified that neither Mr. L or Mr. H had the right to control respondent in the operation of his truck. She stated that, if a truck broke down, it would be leasing company's responsibility to see that shipment was completed, or they would probably lose the contract with the trucking company. Ms. S acknowledged that leasing company was not claiming that they were responsible to the trucking company's customer for whom respondent was picking up and delivering drill pipe.

Ms. S stated that the first paycheck issued to respondent by the leasing company was dated January 12, 1991. Ms. S testified that her company did not lease trucks or equipment to the trucking company.

Although Ms. Z was present, neither party called her to testify. A letter dated April 3, 1991, from Ms. Z to the appellant's insurance carrier, identified Ms. Z as "office manager." It is written on trucking company stationary that includes its address and telephone number. The letter says, "The above-mentioned, [respondent], is a leased employee. This means he works for us but is employed by [leasing company]. To find out more information about him and his employment you will need to contact [Ms. S] at [telephone number]. If I can be of any further assistance please call me at the above number." Ms. Z does not indicate that she is an agent for leasing company.

Appellant argues that the contract vests right of control in leasing company, based primarily on the last clause of paragraph 6 and paragraph 7 of the agreement. Under the agreement, the leasing company is called "Lessor," the trucking company is called "Lessee." The entire paragraph 6 is as follows:

"6.ADMINISTRATION:

> It is understood and agreed that Lessor is an independent contractor and all individuals assigned to Lessee are employees of Lessor. Lessor is thereby responsible for such administrative employment matters as 1) issuing paychecks; 2) payment of all federal, state, and local employment tax; 3) providing Employee Comprehensive Medical and Disability insurance coverage for injuries; 4) obtaining disability, liability, life and group health insurance, and 5) providing for pension plan coverage, as well as other non-obligatory fringe benefit programs for its employees. Lessor agrees to hold Lessee harmless from direct out-of-pocket expenses of Lessee which may result from lessor's failure to provide benefits for Lessor employees or failure to conduct itself in accordance with applicable state and federal law; however, Lessor shall not be liable in any event for Lessee's loss of profits, business goodwill, or other consequential, special, or incidental damages.
>
> Lessor shall have the sole responsibility for recruiting, hiring, training, evaluating, replacing, disciplining, and terminating of individuals assigned to Lessee."

The agreement purports to cover all positions listed in a "Schedule A," which are described as "all operators and laborers." Whatever it may say about contract administration, paragraph 6 does not speak to the day-to-day supervision of the work and tasks of its employees. This is ostensibly covered in paragraph 7:

7.SUPERVISION:

> Lessor may designate an on-site supervisor from among its employees assigned to Lessee. The on-site supervisor shall direct operational matters relating to service provided by Lessor employees shall be under the direct supervision of Lessor regional manager for the area. (sic) If Lessor does not designate an on-site supervisor, Lessor's employees assigned to Lessee shall be responsible to Lessor regional manager for

their area.

The Lessor's on-site supervisor, or if none, the Lessor's regional manager shall determine the procedures to be followed by Lessor employees regarding the time and performance of their duties.

Lessee agrees to cooperate with Lessor in the formation of such procedures and permit Lessor to implement its policies and procedures relating to Lessor employees.

Finally, another pertinent provision of the agreement indicates that a material breach of the agreement can occur by the trucking company "committing any act that diminishes any of the Lessor's rights as the employer of Lessor's employees provided under this Agreement."

We disagree with the appellant's argument that the hearing officer "need go no further" than the contract in his inquiry to determine which employer actually had the right to control respondent's actions. The right of control of a servant is usually a question of fact. Sparger v. Worley Hospital, Inc., 547 S.W.ed 582 (Tex. 1977). In determining this fact, it is necessary to examine evidence not only as to the terms of the contract, but also evidence 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).

Even in the case of a written contract, the trier of fact can consider other evidence to determine whether the contract is a sham or has been abandoned, *see* Newspaper Inc. v. Love, 380 S.W.2d 582 (Tex. 1964), or where the contract doesn't clearly speak to the right of control. Archem Company v. Austin Industrial Inc., 804 S.W.2d 268 (Tex. Civ. App.-Houston [1st Dist] 1991, no writ). While the court will look to any express contract, it need not be merely concerned with form over substance. Kemp v. Frozen Food Express, 618 F. Supp. 431 (E.D. Tx 1985).

By arguing the importance of the lease agreement, however, the appellant overlooks the contract that preceded it -- the employment agreement between respondent and trucking company. It was undisputed that respondent was hired to work for trucking company, was not initially hired by leasing company, and was not terminated by trucking company. It was uncontroverted that respondent was never asked or directed to work for leasing company.

A party asserting that an employment agreement of an at-will employee has been modified has the burden of proving that the employee knew of, and agreed expressly or impliedly to the modification. *See* Hathaway v. General Mills, Inc., 711 S.W.2d 227 (Tex. 1986). Even if an employee is subject to the direction of a temporary master, no new

relationship of employment will be created if, in following the directions of the temporary master, the servant is merely acting in obedience to, and in general performance of duties to, his original employer. United States Fidelity & Guaranty Co. v. Goodson, 568 S.W.2d 443, 447 (Tex. Civ. App.-Texarkana 1978, writ ref'd n.r.e.).

There is a line of opinions holding that a workers' compensation claimant who is without knowledge (or cannot be charged with knowledge) of secret agreements between employers is not bound by such agreements, and is not precluded from recovering compensation from the employer's insurer on the theory that he worked for the employer. Employers' Mutual Liability Insurance Co. v. Norman, 201 S.W.2d 620 (Tex. Civ. App.-Eastland 1947, writ ref'd n.r.e.); Texas Employer's Insurance Co. v. Neely, 189 S.W.2d 626 (Tex. Civ. App.-Amarillo 1945, no writ). In a suit for personal injury, the Beaumont Court of Appeals similarly determined that to establish an employee/employer relationship between an employee and a borrowing employer, the employee must know or be charged with knowledge of the lending agreement. Guerrero v. Standards Alloys Mfg. Co., 566 S.W.2d 100 (Tex. Civ. App.- Beaumont 1978, writ ref'd n.r.e.). The burden is on the carrier to prove that an employee has ceased to be an employee of the first employer, and has become an employee of the second employer. Dodd v. Twin City Fire Insurance Co., 545 S.W.2d 766 (Tex. 1988). Issuance of paychecks and withholding of taxes is not conclusive of employee status. Mayo v. Southern Farm Bureau Casualty Co., 688 S.W.2d 241 (Tex. Civ. App.- Amarillo 1985, writ ref'd n.r.e.).

In the case under consideration, the "borrowing" company would be the leasing company, not the trucking company. There is sufficient probative evidence in the record for the hearing officer to conclude that the leasing company never became the employer of respondent, either in fact or through the "borrowed servant" doctrine, and that the trucking company was the employer on the date of injury.

As stated in Appeals Panel Decision No. 92035 decided March 12, 1992, "it would be a real sleight of hand situation if an employer could perform all the hiring procedures, lead an individual to believe he was hired as an employee, put him to work at a site where he and others of his co-employees were working, indicate he was covered by workers' compensation, and then, without indicating in any way that such employee was loaned to some other employer and not disclosing or otherwise making known any arrangements with another employer, disclaim any employee relationship when an injury occurs." We noted then, and note here, that this is not the intent of the Texas Workers' Compensation Act.

Whether the contract works to transfer and retain right of control in the leasing company over the details of operating the trucks is open to considerable question. Paragraph 7 provides that the trucking company is to cooperate in the formation of procedures by which leased employees will operate. The trucking company is regulated by the Railroad Commission, and owns the trucks it operates. There was evidence that the

trucking company is also engaged in interstate commerce based upon respondent's testimony that he went to (City 3) on the job. Although the trucking company's status was pointedly raised, there was no evidence that the leasing company was permitted as a motor carrier. Ms. S's testimony indicates that it considered that its responsibilities were to trucking company, not to trucking company's customers.

TEX. REV. CIV. STAT. ANN. art. 911b (Vernon's Supp. 1992) defines motor carrier to include a corporation "owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this state . . . ." Art. 911b, § 1(g). Motor carriers are required by this article to obtain the applicable permit from the Railroad Commission. If the contract were constructed in the manner urged by appellant, that the leasing company maintained right of control over the drivers of trucking company's trucks, then the leasing company should itself be permitted in accordance with this law. Operation as a carrier without proper operating authority is illegal, and a contract based upon such illegal operation can be voided. *See* Ben E. Keith Co. v. Lisle Todd Leasing, 734 S.W.2d 725 (Tex. Civ. App.- Dallas 1987, writ ref'd n.r.e.).

Given the regulation imposed upon a motor carrier's business, including the insurance requirements set forth in Art. 911b, (and given the further indication that the trucking company may be subject to laws regulating interstate commerce, such as drug testing), it is illogical that the contract would operate to surrender the right of operational control of the trucks to leasing company. With no evidence that the leasing company is a permitted motor carrier, it is not unreasonable to believe that the trucking company is permitted because it not only owns, but also controls and operates its fleet of vehicles.

As a matter of law, statutes governing operation of motor vehicles or operation as a certificated carrier become terms of the contract. See Greyhound Van Lines Inc. v. Bellamy, 502 S.W.2d 586, 588 (Tex. Civ. App.- Waco 1973, no writ). The Waco Court of Appeals determined that TEX. REV. CIV. STAT. ANN. Article 6701c-1 governing operation of commercial motor vehicles over the public highways, provided that the truck lessee in that case shall have full and complete control over the operation of the vehicle, and that this requirement would have become part of the contract under consideration even if not expressly included.

Based upon the evidence in the record in the case *sub judice*, trucking company's trucks fall within the definition of commercial motor vehicles as defined by TEX. REV. CIV. STAT. ANN. art 6701c-1, § 1 (Vernon's Supp. 1977). Section 2 of this article (Vernon's Supp. 1992) requires that:

> "No commercial motor vehicle nor any truck-tractor shall be operated over any public highway of this state by any person other than the registered owner thereof, or his agent, servant, or employee under the supervision, direction,

> and control of such registered owner unless such other person under whose supervision, direction, and control said motor vehicle or truck-tractor is operated shall have caused to be filed with the Department [of Public Safety] an executed copy of the lease, memorandum, or agreement under which such commercial motor vehicle or truck-tractor is being operated." (emphasis added)

The statute requires the acknowledgement of this filing to be maintained in the vehicle. Art 6701c-1, § 1. (The exceptions to this statute do not appear to apply to remove trucking company from the scope of this law, based upon the testimony of Mr. H.)

Therefore, even if we agreed with appellant's argument that the contract controls the arrangement between the two "employers," we note that the law requiring trucking company to maintain operational control of its vehicles becomes a term of the contract by operation of law. The evidence that trucking company exercises control over the initial screening of drivers, gives daily instructions to drivers regarding their load and destination, and arranges for other trucks because of equipment failure, is consistent with, and not opposed to, these imputed contract terms. Although the leasing company may have the power to supervise respondent in some measure, supervision over the ends to be accomplished does not equate to the right to control the means and details of its accomplishment. *See* Thompson v. Travelers' Indemnity Co. of Rhode Island, 789 S.W.2d 277 (Tex. 1990).

So far as the contentions raised by the appellant that the findings of the hearing officer are based upon insufficient evidence, or are against the great weight of the evidence, we note that, according to the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. art 8308-6.34(e), the hearings officer is the sole judge of the weight, credibility, relevance, and materiality of the evidence. His decision should not be set aside even if different conclusions or inferences could be drawn on review of the record. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ) the trier of fact is entitled to draw reasonable inferences from direct evidence and facts proven. Western Casualty & Surety Co. v. Carlson, 317 S.W.2d 259 (Tex. Civ. App.-San Antonio 1958, writ ref'd n.r.e.). Only if the evidence supporting the hearing officer's decision is so weak, or if the decision is so against the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust, is it appropriate for the trier of fact to be reversed on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

There is sufficient probative evidence in the record to support the findings of fact, conclusions of law, and decisions of the hearing officer. We affirm.

_____

Susan M. Kelley
Appeals Judge

CONCUR:

_____

Stark O. Sanders, Jr.
Chief Appeals Judge

_____

Robert W. Potts
Appeals Judge