APPEAL NO. 950412

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 2, 1995, a hearing was held in (city), Texas, with (hearing officer) presiding. He determined that claimant was the employee of (claimant) (employer--its successor carrier is, (carrier 1) at the time of his injury on (date of injury). Carrier 1 asserts that (situs employer--its carrier is, (carrier 2) had the right of control of claimant and therefore claimant's injury was covered by carrier 2 at the time. Carrier 2 replies that the decision should be upheld. Both carriers ask that the date of injury be correctly set forth in the decision.

DECISION

We affirm.

Claimant had worked for employer only a few months at the time of the accident. He was not present at the hearing, but his statement indicates that he did not have significant experience working in the oil field. Prior to the date of injury on (date of injury), employer and situs employer entered into a contract under which employer would supply situs employer with personnel. The contract specifically called for employer to retain the right of control when its employees were working at a location of situs employer under the contract. The evidence before the hearing indicated that on (date of injury), four employees were furnished to situs employer by employer. One of the four was a "pusher", described as a supervisor; he and two others were used in one location of situs employer. Claimant was instructed to go with one of situs employer's employees, apparently to service equipment, including a compressor. (We note that Section 11 of TEX. REV. CIV. STAT. ANN. Art. 9104 (Vernon Supp. 1995) providing that a leasing company and a client company may be co-employers for workers' compensation insurance purposes did not go into effect until September 1, 1993.)

Claimant's statement indicated that employer's owner, (DB) was at the location of situs employer on the morning of (date of injury). DB sent claimant to work with (BA) an employee of situs employer. BA and claimant went to another location of situs employer and on this occasion DB did not accompany claimant to the second location. Upon arrival at the second location, claimant's statement indicates that BA told him to loosen valve covers on an engine at a compressor station. (Claimant stated that he had done this work before.) BA then went some distance away to work on something else. Claimant got a wrench, and possibly other tools, out of the truck and began to loosen the first nut when there was an explosion behind him, badly burning claimant. (Claimant's statement is unsigned, is missing at least one page, and one page present was apparently misaligned in the copying so that every word is not apparent--because the statement in the record does contain claimant's recollection of events leading to the explosion, this document does not require remand.)

BA's statement indicates that he and claimant left the location, where DB had assigned his personnel to particular jobs, to go to a different location in a truck owned by situs employer. BA stopped to turn on a pump and then continued to an engine room. BA told claimant to get some tools and BA went into the engine room where he adjusted the engine. He noticed that the pump had caused an overflow and left the engine room to attend to it. While attending the pump, he heard the explosion; he did not know if claimant was still getting tools or had gone inside the engine room. He ran around to the other side of the engine room and saw claimant on fire. BA helped extinguish the flames and took claimant for medical care.

(Mr. P) in his statement indicated that he is a superintendent for situs employer. On the day in question he believes that DB was at the location of situs employer. When situs employer indicated what it needed from employer, then DB would assign certain of his employees to the particular task needed.

Also in evidence was a release in which claimant released situs employer upon receiving a very substantial settlement.

Carrier 1 argued at the hearing that situs employer exercised the right of control over claimant on the day of the injury, pointing out that claimant was to help BA at the time and there were no employer's representatives present at the location where BA and claimant worked. Carrier 1 cites Exxon Corporation v. Perez, 842 S.W.2d 629 (Tex. 1992), and Aguilar v. Wenglar Construction Company, Inc., 871 S.W.2d 829 (Tex. App.-Corpus Christi 1994, no writ), as looking to right of control in determining whether an employee becomes a borrowed servant with Exxon saying that a contract which assigns the right of control is a factor to be considered. In Exxon the court cited Producers Chemical Co. v. McKay, 366 S.W.2d 220 (Tex. 1963) as authority that a contractual provision assigning right of control is a factor to be considered. While this Appeals Panel does not find a limitation in Producers Chemical that makes a contract provision addressing right of control only one factor, it is clear that Exxon so holds; Exxon then points out that the contract should not be a sham and looks to see whether contract provisions are enforced; it concludes by observing that the record is "replete with evidence" of Exxon's right to control, citing that Perez was told "how to cut pipe".

Aguilar did not have a contract provision addressing right of control, and the court correctly looked to right of control of the details to determine whether Aguilar was a borrowed servant. This case also observed that the determination as to borrowed servant is a case-by-case question.

Carrier 2 cites Appeals Panel decisions and a series of cases including Bucyrus-Erie Co. v. Fogle Equipment Corp., 712 S.W.2d 202 (Tex. App.-Houston [14th Dist] 1986, writ ref'd n.r.e.) that indicate that if an express provision in a contract supplying personnel provides for the right to control, then that provision governs unless it is a sham or has been abandoned.

The hearing officer shows in the findings of fact in his decision that he not only considered the contract provision that assigned right of control, but found that employer exercised some control over its employees at the location of situs employer. He also considered whether the contract was a sham or was abandoned, finding that it was not a sham and not abandoned. With Mr. P, DB, and claimant all agreeing that DB sent claimant to work with BA and with the evidence showing that at the time of the explosion BA was not exercising the right of control of the details of claimant's work but was in a different area himself, the hearing officer had sufficient evidence upon which to base his decision that claimant was the employee of employer at the time of injury. The decision is consistent with Exxon which commented on the question of whether the contract is a sham or was enforced in stating that a contract provision is a factor to be considered. In addition the evidence showed that DB, in assigning his personnel at the situs employer's location, provided a supervisor to accompany some of his other personnel who were to undertake other tasks for situs employer under the contract. While the latter employees were not directly concerned with claimant's injury, this fact also shows that employer was acting consistently with the terms of the contract. Finally, the facts herein are not "replete with evidence" that situs employer told claimant "how to" do anything, in contrast to Exxon.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. With his findings indicating that he looked beyond the contract provision which assigned right of control to employer, he adequately complied with the guidance found in Exxon. Having appropriately applied the law to the fact situation, the evidence sufficiently supports the decision that claimant remained the employee of employer at the time of the accident.

In affirming the decision and order we modify all references to date of injury to read (date of injury), not 1994. In addition we change the word "when" in the next to last sentence in the "Decision" to "until", so that such sentence reads, "[t]emporary income benefits are to be paid until disability ends. . . ."

Finding the decision and order sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge