APPEAL NOS. 000024
AND 000025

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 October 18 and December 14, 1999, in (City 1). The hearing officer determined that the appellant, City of City 1 (self-insured), was the employer of the deceased firefighters and that they sustained a compensable injury on _______, which resulted in their deaths. The self-insured appeals this determination, asserting error in the interpretation of a regulation of the self-insured considered to be controlling by the hearing officer. The respondents (claimants) reply that the decision is correct and should be affirmed.

DECISION

Affirmed.

The deceased were full-time firefighters for the self-insured. They also were volunteer firefighters for the (City 2). On the morning of _______, a fire broke out at a structure in the city of (City 3). The City 2 and the City of City 3 had mutual aid agreements in the case of a fire, but neither city had an express agreement with the self-insured. City 1 more or less surrounded City 3 and City 2. The deceased were called by the City 2 Fire Department to respond to the fire in City 3. They did so, arriving on the scene in a City 2 vehicle. The on-scene, or incident, commander was MC, the volunteer fire chief for City 3, who also was a full-time firefighter for the self-insured, but not on duty for the self-insured at the time of this fire. (JJ), then a fire captain for the self-insured on duty at the time with two other City 1 firemen, noticed the smoke while inspecting an apartment building in City 1. He decided to investigate the source of the smoke and drove to the fire in a City 1 Fire Department vehicle. According to JJ's testimony, the three arrived on the scene about 30 seconds before the roof collapsed. On the roof were the deceased and a fireman from another city. JJ testified that he reported this over the radio to his dispatcher and advised the dispatcher that he and his crew would render aid. The deceased perished in the fire when the roof collapsed. The issues were framed in terms of whether the self-insured was the employer and whether the deceased were in the course and scope of their employment at the time they died.

Section 401.011(12) defines course and scope of employment as "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." An employee of one employer may be the "borrowed servant" of another employer. Traditionally, one of the tests for identifying who is the employer of the employee is to determine who has the right of control over the activities of the employee. Texas Workers' Compensation Commission Appeal No. 91115, decided January 29, 1992. The right of control may be exclusive or concurrent.

The self-insured appeals the following findings of fact and conclusions of law of the hearing officer:

FINDINGS OF FACT

3. [Deceased] responded as firefighters for the [self-insured] to a call from the City 2 for help in putting out a fire at a structure located in the City of City 3.

4. At the time of death on _______, both . . . were engaged in activities having to do with and which originated in their profession as firefighters for the [self-insured].

5. The injuries sustained by [deceased] which resulted in their deaths were incurred while engaged in or about the furtherance of the affairs or business of the [self-insured].

6. [Deceased] were in the course and scope of their employment with the [self-insured] on _______, when they sustained injuries which resulted in death.

CONCLUSIONS OF LAW

4 and 6. The [self-insured] was [the] employer at the time of injury on _______ for purposes of the [1989 Act].

The hearing officer found that the following regulation of the self-insured was "controlling" on the issues before her:

> Fire Department members shall: . . . . Use their training and their capabilities to protect the public at all times, both on and off duty.

She commented in her discussion of the evidence that the use of the word "shall" made this regulation directive; that there was "no geographic limit to this regulation"; that, through it, the self-insured "retained the right to control the actions of firefighters, even if off duty, by requiring them to respond to pleas for help in protecting the public; and that "[t]hrough it the [self-insured] retained the right to control the actions of firefighters, even if off duty, by requiring them to respond to pleas for help in protecting the public."

The position of the self-insured on appeal is that this regulation was the only evidence that it retained any right of control over the activities of the deceased or that they were in furtherance of the self-insured's business when they died and that the hearing officer grossly misinterpreted the scope and extent of this regulation. In support of this position, it relies on the deposition and testimony of the City 1 fire chief, who said the

regulation was prepared under his direction. He said the intent of the regulation was for firefighters to render aid within their training "at any time they came across an incident, whether they're on or off duty . . . " and there was no intention "of covering firefighters that would be involved in another jurisdiction working for their Fire Department." While a standard of reasonableness must be applied in interpreting this rule, we do not believe that the fire chief's interpretation is evident from its language or that the interpretation given it by the hearing officer is necessarily unreasonable particularly where, as here, her interpretation is in the context of a response to a serious fire in a city contiguous to and surrounded by the City of City 1. Thus, we cannot agree that the interpretation of the hearing officer was erroneous as a matter of law. We further conclude that this interpretation of this rule provides sufficient evidence to support the hearing officer's findings that the activities of the deceased originated in their profession as firefighters and that they were engaged in the furtherance of the affairs or business of the self-insured.

The self-insured also argues on appeal that there was insufficient evidence that the self-insured exercised any control over the deceased at the time of the fatal accident and, thus, could not be the employer. The hearing officer found control in the rule’s requirement that the deceased respond when called. There was other evidence that the deceased were not in communication with MC, the on-scene commander, when the roof collapsed. From this evidence it could be inferred that they were self-directed in the activities leading up to the collapse or, at least, under the dual control, that is, dual employment, of the self-insured’s and City 2 fire departments.

Finally, the self-insured contends on appeal that it should not be considered to be the employer of the deceased at the time of the fatal accident as a matter of policy and fairness to the taxpayers of City 1 who received no benefit for their services. We question whether it was established that the self-insured received no benefit from the efforts of the deceased to fight a significant fire in an area largely surrounded by the City of City 1. In any case, we believe that the rule itself established the interests of and benefits to the self-insured in the actions of the deceased.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge