Citation #1
9 P3d 1013

LEXSEE

Positive
As of: Apr 26, 2012

LANCE ANDERSON, Appellant, v. TUBOSCOPE VETCO, INC. and OLSTEN STAFFING SERVICES, Appellees.

Supreme Court No. S-9080, No. 5319

SUPREME COURT OF ALASKA

9 P.3d 1013; 2000 Alas. LEXIS 94

October 6, 2000, Decided

PRIOR HISTORY: [**1] Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kenai, Harold Brown, Judge. Superior Court No. 3KN-96-852 CI.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant temporary employee claimed the Superior Court of the State of Alaska, Third Judicial District, Kenai (Alaska) erred in granting summary judgment in favor of appellee special employer on claim for work-related injuries and in holding him solely responsible for attorney fee award.

OVERVIEW: Appellant temporary employee brought a negligence suit against appellee employer seeking compensation for a work-related injury, and appellee employer filed a third party complaint against appellee temp agency. The superior court ruled that appellee employer was appellant's special employer and was therefore exempted from suit by the exclusive remedy provision of Alaska Stat. § 23.30.055 of the Alaska Workers' Compensation Act. An implied contract of employment existed between appellant and appellee employer. Appellee employer met requirements of special employer test. Appellant made a contract of hire with appellee employer; the work was essentially that of appellee employer, and appellee employer had the right to control the work. Trial court did not err in entering an award of attorney fees and costs against him only. Doctrine of unjust enrichment was inapplicable, as appellee temp agency gained nothing from action.

OUTCOME: Judgment affirmed. Appellee employer was immune from tort liability under Alaska Workers' Compensation Act. Implied employment contract existed, and work was performed exclusively for appellee employer, who had complete control. Unjust enrichment doctrine did not apply to appellee temp agency.

CORE TERMS: temporary, special employer, workers' compensation, summary judgment, insurer, compensation act, attorney's fees, supervised, employment contract, partially, payroll, exclusive remedy provision, compensation coverage, de novo, subrogated, right to control, paycheck, regular, hired, prong, hire, exclusive remedy, compensation purposes, compensation insurance, real party in interest, reimbursed, premium, contract of employment, tort liability, general employer

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1]A grant of summary judgment is reviewed de novo.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview
[HN2]Temporary employees are employees of the temporary employer for workers' compensation purposes as a matter of law.

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview
[HN3]See Alaska Stat. § 23.30.055.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN4]Under the special employment doctrine, temporary agency employees are employees of both the temporary agency and the company to which they are assigned. This doctrine states that if a labor broker contracts to provide the services of a temporary employee to a customer company, which serves as a temporary employer, the labor broker is considered a general employer and the company is considered a special employer.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview
[HN5]As a special employer, the temporary employer is considered to have the same rights and privileges as a regular employer for workers' compensation purposes. Consequently, the exclusive remedy provision of Alaska Stat. § 23.30.055 of the Workers' Compensation Act generally precludes a temporary employee from suing the temporary employer for negligence in connection with a work-related activity.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN6]When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if: (a) the employee has made a contract of hire, express or implied, with the special employer; (b) the work being done is essentially that of the special employer; and (c) the special employer has the right to control the details of the work. When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN7]If the temporary employer hires, trains, employs, directs, and reserves the right to terminate the temporary employee, and the labor broker merely acts in the capacity of a payroll and benefits administrator, an employment contract exists between the temporary employer and the temporary employee.

Contracts Law > Types of Contracts > Implied-in-Law Contracts
[HN8]The general principle of the doctrine of unjust enrichment is that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated.

Contracts Law > Types of Contracts > Implied-in-Law Contracts
[HN9]The doctrine of unjust enrichment is predicated on the theory of restitution: when a party unjustly receives, retains, or appropriates property or a benefit, the party should repay the source of the property or benefit. There is nothing in this doctrine that suggests that a party must pay restitution for the creation of a rather slim possibility that the party may receive some benefit in the future.

COUNSEL: Michael J. Schneider, Anchorage, and John C. Dittman, Anchorage, for Appellant.

Robert L. Griffin and Linda J. Hiemer, Law Offices of Robert L. Griffin, Anchorage, for Appellees.

JUDGES: Before: Matthews, Chief Justice, Eastaugh, Fabe, Bryner, and Carpeneti, Justices.

OPINION BY: CARPENETI

OPINION

[*1015] CARPENETI, Justice.

I. *INTRODUCTION*

Lance Anderson appeals the superior court's grant of summary judgment to Tuboscope Vetco, Inc. (Tuboscope) and Olsten Staffing Services (Olsten) on Anderson's negligence claim against Tuboscope for injuries he suffered while working as a temporary employee at Tuboscope's plant. Anderson argues that the superior court erred in ruling that Tuboscope was Anderson's special employer and was therefore [**2] exempted from suit by the exclusive remedy provision of the Alaska Workers' Compensation Act. Anderson further argues that the superior court erred in failing to assess a portion of Tuboscope's costs and fees against Olsten as a partially subrogated insurer.

Because the superior court ruled correctly on both the summary judgment and the attorney's fees issues, we affirm.

II. *FACTS AND PROCEEDINGS*

A. *Facts*

In 1991 Olsten and Tuboscope entered into a continuing contract agreement for Olsten to provide temporary employees to Tuboscope to assist Tuboscope in its business of providing oilfield-related materials and services. Olsten provided Tuboscope with various categories of temporary employees, including "personnel transfer plan" (PTP) employees. Tuboscope recruited, hired, placed, and directly and exclusively supervised PTP employees; Olsten provided the payroll administration, benefits, and workers' compensation coverage for PTP employees.

In October 1994 Tuboscope hired Anderson as a PTP employee. Pursuant to the provisions governing PTP employees laid out in Tuboscope and Olsten's contract, Anderson was recruited, interviewed, and placed in his position by Tuboscope. [**3] Tuboscope also set Anderson's wages [1] and had the authority to fire him without the prior approval or consent of Olsten.

1 Olsten issued Anderson's paycheck, based on the hours he worked for Tuboscope. Tuboscope reimbursed Olsten for Anderson's wage, plus an additional 32% to cover Anderson's payroll administration and workers' compensation insurance. There is no record of Anderson having any other contact with Olsten.

Anderson's daily work activities at the Tuboscope job site were supervised by Tuboscope employees. His direct supervisor was Tuboscope employee Frank McAnally.

[*1016] On December 30, 1994, Anderson was injured at Tuboscope's job site in Kenai when Ronald Finch, a Tuboscope employee, picked up some drill pipe in a manner that caused Anderson to fall and hurt his shoulder. Anderson's injury occurred while he was performing job duties directed and supervised by McAnally. Subsequent to his injury, Anderson received workers' compensation benefits through the policy secured by Olsten. [2] [**4]

2 On August 14, 1995, Tuboscope hired Anderson as a full-time regular employee. From this point forward,

Anderson was no longer a PTP employee for whom administrative services were provided by Olsten. Tuboscope now pays Anderson directly, provides him with benefits, and covers him for workers' compensation.

B. *Proceedings*

In December 1996 Anderson filed a complaint against Tuboscope in superior court. Tuboscope filed a third party complaint against Olsten in April 1997 to enforce its agreement with Olsten that Olsten would hold harmless and indemnify Tuboscope.

The parties cross-moved for summary judgment, seeking a determination as to whether the exclusivity provisions of the Alaska Workers' Compensation Act (the Act) barred Anderson's suit. Olsten later filed an opposition to Anderson's motion for summary judgment, alleging that Tuboscope was a joint or dual employer of Anderson and was therefore immune from common law tort liability.

On March 27, 1998, the superior court granted Tuboscope's [**5] motion for summary judgment, finding that an implied contract of employment existed between Anderson and Tuboscope and that Anderson's claims against Tuboscope were consequently barred by the exclusive remedy provision of the Act. The superior court also assessed $ 5,693.70 in costs and attorney's fees against Anderson, declining to rule that Olsten was liable for a portion of the costs and fees. Anderson now appeals.

III. *STANDARD OF REVIEW*

[HN1]We review a grant of summary judgment *de novo*. [3] The question of whether the superior court erred in failing to enter a portion of Tuboscope's costs and fees against Olsten as a partially subrogated insurer is a legal question that we also review *de novo*. [4]

3 *See* *Wilson v. Municipality of Anchorage*, 977 P.2d 713, 719 (Alaska 1999).

4 *See* *State v. Arbuckle*, 941 P.2d 181, 184 (Alaska 1997) (stating that attorney's fees award is reviewed under the *de novo* standard because it involves contract interpretation); *Palmer G. Lewis Co. v. Arco Chemical Co.*, 904 P.2d 1221, 1234 n.31 (Alaska 1995) ("Review of attorney's fees based on indemnity is a question of law which we may review *de novo*.").

[**6] IV. *DISCUSSION*

A. *As Anderson's Employer, Tuboscope Is Immune from Tort Liability under the Exclusive Remedy Provision of the Alaska Workers' Compensation Act.*

The primary question raised in this appeal is whether a labor service company's employee, who is assigned to a temporary employer, makes a contract of hire with the temporary employer and thus comes under the exclusive remedy provision of Alaska's Workers' Compensation Act. [5] Anderson argues that Tuboscope is subject to tort liability for his injury because he is not a Tuboscope employee. We disagree. [HN2]Temporary employees are employees of the temporary employer for workers' compensation purposes as a matter of law.

5 [HN3] Alaska Statute 23.30.055 provides that workers' compensation is the exclusive remedy available against an employer to an employee injured at work. In this case, the parties do not dispute that workers' compensation is the exclusive remedy available to an employee against the employer, nor do they dispute any facts. Rather, the parties dispute the legal consequences of the undisputed facts. Therefore, the question before us is whether Anderson was an employee of Tuboscope.

[**7] 1. *Tuboscope was Anderson's employer at the time of his injury.*

Although this is a case of first impression in Alaska, the question of a temporary employee's ability to sue a temporary employer [*1017] in tort has been addressed in numerous jurisdictions. [6]

6 *See* cases cited *infra* note 11.

[HN4]Under the "special employment" doctrine, temporary agency employees are employees of both the temporary agency and the company to which they are assigned. [7] This doctrine states that if a labor broker contracts to provide the services of a temporary employee to a customer company, which serves as a temporary employer, the labor broker is considered a "general employer" and the company is considered a "special employer." [8] [HN5]As a special employer,

the temporary employer is considered to have the same rights and privileges as a regular employer for workers' compensation purposes. [9] Consequently, the exclusive remedy provision of the workers' compensation act [10] generally precludes [**8] a temporary employee from suing the temporary employer for negligence in connection with a work-related activity. [11]

7 *See* *Wedeck v. Unocal Corp.*, 59 Cal. App. 4th 848, 69 Cal. Rptr. 2d 501, 505 (App. 1997); *Ruble v. Arctic General, Inc.*, 598 P.2d 95, 97 n.3 (Alaska 1979) (citation omitted). Although we have not previously addressed the present situation, we have acknowledged the "special employment" doctrine in the context of deciding whether a general employment relationship existed at the time of the employee's accident. *See* *id.* at 97-98.

8 *See* 3 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 48.23, at 8-524, 528, 532 (1997).

9 *See* *Wedeck*, 69 Cal. Rptr. 2d at 505.

10 *See* AS 23.30.055.

11 *See* *Pettaway v. Mobile Paint Mfg. Co.*, 467 So. 2d 228, 229-30 (Ala. 1985); *Araiza v. U.S. W. Bus. Resources, Inc.*, 183 Ariz. 448, 904 P.2d 1272, 1276 (Ariz. App. 1995); *Wedeck*, 69 Cal. Rptr. 2d at 505; *Kelly v. Geriatric and Med. Servs. Inc.*, 287 N.J. Super. 567, 671 A.2d 631, 634 (N.J. App.), *aff'd sub nom.* *Kelly v. Geriatric & Med. Ctrs., Inc.*, 147 N.J. 42, 685 A.2d 943 (N.J. 1996) (per curiam); *Vigil v. Digital Equip. Corp.*, 1996 NMCA 100, 925 P.2d 883, 887, 122 N.M. 417 (N.M. App. 1996); *Shoemaker v. Manpower, Inc.*, 223 A.D.2d 787, 635 N.Y.S.2d 816, 817-18 (App. Div. 1996); *Poirier v. Manpower Inc. of Providence*, 689 A.2d 1036, 1036-37 (R.I. 1997) (per curiam); *Goodman v. Sioux Steel Co.*, 475 N.W.2d 563, 564-65 (S.D. 1991).

[**9] In his treatise on workers' compensation law, Professor Larson sets forth a commonly used test for determining whether a special employer is liable for workers' compensation (and therefore immune from tort liability):

[HN6]When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if:

(a) the employee has made a contract of hire, express or implied, with the special employer;

(b) the work being done is essentially that of the special employer; and

(c) the special employer has the right to control the details of the work.

When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation. [12]

12 Larson & Larson, *supra* note 8, § 48.00, at 8-434. Cases that apply this test in similar contexts include *Pettaway*, 467 So. 2d at 229; *Vigil*, 925 P.2d at 886-87; and *Goodman*, 475 N.W.2d at 564-65. While this test focuses on liability for workers' compensation, it is useful here because an employer's liability to an employee for common-law negligence is precluded by that employer's liability for workers' compensation under the Alaska Workers' Compensation Act. *See* AS 23.30.055.

[**10] Although we have not previously addressed the question at issue in the instant case, we have recognized and used Professor Larson's test in other contexts. [13] In keeping with our earlier decisions, we today adopt this test as the standard for determining workers' compensation liability in the temporary employee context. We hold that Tuboscope meets all three requirements of this test.

13 *See* *Cluff v. NANA-Marriott*, 892 P.2d 164, 168-71 (Alaska 1995) (using portions of this test to determine workers' compensation coverage in lent-employee context); *Ruble*, 598 P.2d at 97-98 (using this test to determine whether employee of subcontractor could sue general contractor for negligence).

a. *Anderson had an implied contract of employment with Tuboscope.*

The very nature of the contract between Olsten and Tuboscope suggests that [*1018] an implied employment contract existed between Tuboscope and Anderson. [14] The contract between Olsten and Tuboscope regarding PTP employees [**11] effectively provided that Tuboscope would interview, hire, train, and employ the PTP employees, while Olsten would provide payroll administration and workers' compensation insurance premiums. Under this arrangement, Anderson's primary employment contact from the time of his initial interview was with Tuboscope. He had no contact with Olsten whatsoever except to fill out forms for them and receive his paycheck from them. When he worked, all of his assignments were given to him by Tuboscope management and were performed for the sole benefit of

Tuboscope, not Olsten. Aside from the fact that Olsten performed administrative tasks for Tuboscope regarding his employment, there is no essential difference between Anderson and a regular Tuboscope employee. [15]

14 The parties do not dispute that there was no express employment agreement between Anderson and Tuboscope.

15 Anderson does cite a number of superficial differences between PTP employees and regular Tuboscope employees. However, it is immaterial that Tuboscope treated Anderson differently from its other employees. Tuboscope is Anderson's special employer, not his general employer; therefore, he shares a different relationship with Tuboscope than its general employees. This special employment relationship does not bring Anderson or Tuboscope out of the ambit of workers' compensation.

[**12] [HN7]

If the temporary employer hires, trains, employs, directs, and reserves the right to terminate the temporary employee, and the labor broker merely acts in the capacity of a payroll and benefits administrator, an employment contract exists between the temporary employer and the temporary employee. [16] The type of temporary employment situation existing in the instant case satisfies this standard.

16 In *Cluff v. NANA-Marriott*, we stated that "an implied employment contract is formed by a relation resulting from the manifestation of consent by one party to another that the other shall act on his behalf and under his control, and consent by the other so to act." 892 P.2d at 171 (internal quotation marks omitted) (quoting *Childs v. Kalgin Island Lodge*, 779 P.2d 310, 314 (Alaska 1989)).

When Anderson first sought employment with Tuboscope, he interviewed directly with the company. His job duties and the terms of his employment were communicated to him by Tuboscope personnel. [**13] Anderson was also told that Tuboscope had the right to terminate him without the consent of Olsten. He did not have any contact with Olsten until after he was hired by Tuboscope, at which time he filled out various forms and paperwork. Anderson worked at Tuboscope's facility and was directly supervised and given assignments by a Tuboscope employee. Tuboscope provided his tools and equipment. Anderson's only contact with Olsten, after he filled out the forms, was to receive his paychecks from Olsten.

Tuboscope's acts of hiring Anderson, assigning him work, and paying him, manifest its consent that Anderson would act on its behalf and under its control. Anderson's acts of accepting work from Tuboscope, and working at its facilities under the exclusive control and supervision of Tuboscope employees, constitute consent by him to act on Tuboscope's behalf and under its control. Therefore, Anderson and Tuboscope had an implied employment contract.

Because an implied employment contract between Anderson and Tuboscope existed, the first prong of the Larson test for determining whether Tuboscope is a special employer that is covered by the Act's tort immunity is satisfied. [17]

17 Anderson argues that Tuboscope should not be considered an employer for workers' compensation purposes because Olsten, not Tuboscope, paid for his workers' compensation insurance premiums. However, the fact that Tuboscope did not directly provide workers' compensation coverage is immaterial. Under the contract between Tuboscope and Olsten, Tuboscope reimbursed Olsten for the wages it paid Anderson; Tuboscope also paid Olsten an additional 32 percent to cover Olsten's payroll administration and other costs associated with Anderson. Because the contract between Olsten and Tuboscope specified that Olsten must provide workers' compensation coverage for PTP employees, a portion of Tuboscope's 32 percent payment effectively constitutes a payment of Anderson's workers' compensation premium. *See* *Sorenson v. Colibri Corp.*, 650 A.2d 125, 130 (R.I. 1994).

[**14] [*1019] b. *Anderson performed his work exclusively for Tuboscope.*

The second prong of the Larson test -- that the work being done by the employee must be essentially that of the special employer [18] -- is met here. It is undisputed that all of Anderson's work was for Tuboscope. He worked exclusively at Tuboscope's facilities, performed tasks as directed by Tuboscope management, and was exclusively supervised by a Tuboscope employee. Tuboscope provided his tools and equipment.

18 *See* Larson & Larson, *supra* note 8, § 48.00, at 8-434.

Anderson's limited relationship with Olsten provides further evidence that the work he performed was solely for Tuboscope. His only contact with Olsten was to receive his paychecks; he performed no duties for Olsten. In fact,

Anderson never even met in person with Olsten management or employees. We therefore conclude that the second prong of the Larson test is met.

c. *Tuboscope had complete control over Anderson's work*.

The third prong of the Larson test [**15] is that the special employer must have the right to control the details of the employee's work. [19] In this case, Tuboscope clearly had the right to control the details of Anderson's work. As mentioned above, he was supervised only by Tuboscope employees. His work never came under the review of Olsten.

19 *Id.*

Because (1) Anderson and Tuboscope had an implied contract of employment; (2) the work performed by Anderson was exclusively for Tuboscope; and (3) Tuboscope had the right to control Anderson's work, the three parts of the Larson test are satisfied. Consequently, Tuboscope is the type of special employer that comes under the reach of the Alaska Workers' Compensation Act, and Anderson's exclusive remedy against Tuboscope is workers' compensation. The trial court's grant of summary judgment to Tuboscope was therefore proper.

B. *Olsten Is Not Liable for the Superior Court's Award of Costs and Attorney's Fees Against Anderson*.

Anderson argues that the trial court erred in entering an [**16] award of attorney's fees and costs against him only and not against him and Olsten jointly and severally. He asserts that had he prevailed in this action, Olsten would be unjustly enriched by recouping the workers' compensation payment its insurer made to Anderson without Olsten having to bear the costs and burden of litigation. Anderson also contends that Olsten is liable for costs and fees because it is a "partially subrogated insurer" that is essentially a real party in interest in the present case. We disagree.

[HN8]The general principle of the doctrine of unjust enrichment is that "one person should not be permitted unjustly to enrich himself at [the] expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated." [20] As its definition indicates, [HN9]the doctrine of unjust enrichment is predicated on the theory of restitution: When a party unjustly receives, retains, or appropriates property or a benefit, the party should repay the source of the property or benefit. There is nothing in this doctrine that suggests that a party must pay restitution for the creation of a rather slim possibility that the party may [**17] receive some benefit in the future.

20 *Black's Law Dictionary* 1535 (6th ed. 1990).

In the present case, Anderson lost on summary judgment. Therefore, Olsten gained nothing by Anderson's prosecution of his action against Tuboscope. If anything, Olsten lost by having to defend Tuboscope's third-party suit. Consequently, Anderson's unjust enrichment argument fails, and Olsten is not liable for attorney's fees and costs on this ground.

Anderson alternatively argues that our decision in *Truckweld Equipment Co. v. Swenson Trucking & Excavating, Inc.* [21] requires [*1020] us to hold that Olsten is a "partially subrogated insurer" who is a real party in interest subject to an assessment of fees and costs. However, Anderson disregards our explicit statement that "our holding in *Truckweld* should not be applied in the workers' compensation context due to the specific statutory procedures set out in AS 23.30.015." [22]

21 649 P.2d 234, 238-39 (Alaska 1982) (stating that where plaintiff was suing for property damage for which it had been partially reimbursed by insurer, insurer could be considered a real party in interest if insurer was timely joined in action).

[**18]

22 *Exxon Corp. v. Alvey*, 690 P.2d 733, 744 (Alaska 1984).

Because Anderson's arguments as to why Olsten should be held jointly and severally liable for the attorney's fees and costs arising out of this action are meritless, we affirm the superior court's ruling that these fees and costs be assessed only against Anderson.

V. *CONCLUSION*

Because the trial court ruled correctly on both the summary judgment and the attorney's fees issues, we AFFIRM.

Citation #2
111 SW 3d 134

LEXSEE

Caution
As of: Apr 26, 2012

WINGFOOT ENTERPRISES D/B/A TANDEM STAFFING, PETITIONER v. MARLENY ALVARADO, RESPONDENT

NO. 01-0825

SUPREME COURT OF TEXAS

111 S.W.3d 134; 2003 Tex. LEXIS 118; 46 Tex. Sup. J. 959

September 18, 2002, Argued
July 3, 2003, Delivered

PRIOR HISTORY: [**1] ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS.
Alvarado v. Wingfoot Enters., 53 S.W.3d 720, 2001 Tex. App. LEXIS 5003 (Tex. App. Houston 1st Dist., 2001)

DISPOSITION: Reversed. Judgment rendered.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner temporary agency petitioned for review of the reversal by the Court of Appeals for the First District of Texas of the summary judgment for the temporary agency on respondent workers' compensation claimant's negligence claim. The claimant did not appeal from the judgment upon a jury verdict for the hiring employer or the affirmance of the entry of summary judgment for the temporary agency on the claimant's gross negligence claim.

OVERVIEW: The issue was whether the claimant could have more than one employer for purposes of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq. The judgment for the client was based on the jury's finding that the claimant was a borrowed employee. The claimant was covered by the client's workers' compensation policy, which was the claimant's exclusive remedy against the client. The State's highest court held that the claimant was also an employee of the temporary agency and was covered by its worker's compensation policy, leaving the claimant with no recovery under the common law. The temporary agency fell squarely within the Act's definition of employer. For purposes of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., a claimant could have more than one employer where a temporary agency furnished a worker to a client that controlled the details of the work at the time the worker was injured and where there was no agreement between the temporary agency and the client as to workers' compensation coverage. Cases to the contrary were wrongly decided.

OUTCOME: The intermediate court's judgment was reversed. Judgment was rendered for the temporary agency, and judgment was rendered providing that the claimant take nothing.

CORE TERMS: workers' compensation, exclusive remedy provision, temporary, leasing, coverage, general employer, industrial, entity, summary judgment, co-employer, contractor, provider, staff, insurance coverage, common-law, right to control, assigned, hired, subcontractor, borrowed servant, negligence claim, independent contractor, right-to-control, general contractor, law claims, definitions of employer, license holder, contracted, staffing, immune

LexisNexis(R) Headnotes

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN1]The general definitions section of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., defines an employer at Tex. Lab. Code Ann. § 401.011(18).

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN2]See Tex. Lab. Code Ann. § 401.011(18).

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN3]For purposes of the definition of an employer at Tex. Lab. Code Ann. § 401.011(18), an employer has "workers' compensation insurance coverage" if the employer has either obtained an approved insurance policy or secured the payment of compensation through self-insurance as provided under Tex. Lab. Code Ann. § 401.011(44) of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq. In the sections of the Act dealing with coverage election, "employer" is defined as a person who employs one or more employees. Tex. Lab. Code Ann. § 406.001.

Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements
[HN4]See Tex. Lab. Code Ann. § 401.011(44).

Insurance Law > Life Insurance > Beneficiaries > General Overview
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview
[HN5]See Tex. Lab. Code Ann. § 408.001(a).

Torts > Negligence > Defenses > Contributory Negligence > General Overview
Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity
[HN6]If an employer, i.e., "a person who employs one or more employees," under Tex. Lab. Code Ann. § 406.001, elects not to obtain workers' compensation insurance, that employer is subject to common-law negligence claims and may not assert certain defenses, including contributory negligence, assumed risk, or that the injury or death was caused by a fellow employee. Tex. Lab. Code Ann. § 406.033.

Labor & Employment Law > Employment Relationships > Employment at Will > Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > General Overview
[HN7]See Tex. Lab. Code Ann. § 401.012.

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
[HN8]Tex. Lab. Code Ann. § 401.011(12) of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., defines "course and scope of employment."

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
[HN9]See Tex. Lab. Code Ann. § 401.011(12).

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN10]Res judicata prevents the relitigation of a claim or cause of action that has been finally adjudicated in an earlier suit, but only when the parties in the first suit are the same as those in the second suit or are in privity with them.

Governments > Legislation > Interpretation
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN11]The appellate court applies the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., as written in determining workers' compensation issues.

Workers' Compensation & SSDI > Administrative Proceedings > Awards > General Overview
[HN12]While it seems to be the rule that a violation of instructions of an employer by an employee will not destroy the right to compensation, if the instructions relate merely to the manner of doing work, yet it seems to be held by the weight of authority that violation of instructions which are intended to limit the scope of employment will prevent a recovery of compensation.

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN13]In examining the Texas Labor Code's overall scheme for workers' compensation and for protecting workers, the appellate court concludes that the decided bias of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., in favor of employers electing to provide coverage for their employees supports a conclusion that the Act permits more than one employer for workers' compensation purposes.

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
[HN14]Tex. Lab. Code Ann. § 92.002(7) recognizes that an employer may be in the business of providing temporary workers to others.

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
[HN15]See Tex. Lab. Code Ann. § 92.002(7).

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
[HN16]See Tex. Lab. Code Ann. § 92.002(3).

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
[HN17]See Tex. Lab. Code Ann. § 92.002(8).

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
[HN18]There is some regulation of temporary common worker employers under Tex. Lab. Code Ann. §§ 92.002, 92.011, 92.012, 92.022, 92.024, and 92.025, but it is not as extensive as the regulation of a staff leasing service provider under Tex. Lab. Code Ann. ch. 91.

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
[HN19]The Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., by definition, does not cover the providers of temporary workers. Tex. Lab. Code Ann. § 91.001(14(a) and (D).

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
[HN20]See Tex. Lab. Code Ann. § 91.001(14)(A) and (D).

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN21]Tex. Lab. Code Ann. § 91.001(14) of the Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., applies to arrangements in which the employee's assignment is intended to be of a long-term or continuing nature, rather than temporary or seasonal in nature, and a majority of the work force at a client company worksite or a specialized group within that work force consists of assigned employees of the license holder.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview
[HN22]The Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., contemplates that one workers' compensation policy procured by the staff leasing service company will cover employees leased to a client company, and that both the leasing company and the client may rely on the exclusive remedy provision of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
[HN23]See Tex. Lab. Code Ann. § 91.006(a).

Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
[HN24]Under Tex. Lab. Code Ann. § 91.042(d), a license holder elects for both itself and a client company whether to provide workers' compensation insurance.

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
[HN25]The Texas Labor Code expressly addresses "co-employees" in the Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq. Under Tex. Lab. Code Ann. § 91.001(14), staff leasing service companies do not meet the requirement of that Act unless employment responsibilities are in fact shared by the license holder and the client company. A contract between a staff leasing service company and a client must provide that the leasing company shares, as provided by Tex. Lab. Code Ann. § 91.032(b), with the client company the right of direction and control over employees assigned to a client's worksites. Section 91.032(a)(1).

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
[HN26]See Tex. Lab. Code Ann. § 91.032(b)(1).

Contracts Law > Types of Contracts > Lease Agreements > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
[HN27]Under the Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., a staff leasing company makes the election of whether to provide workers' compensation insurance coverage for both itself and the client company for the employees it leases. If a leasing company elects coverage, its policy covers both the leasing company and its client company as to the leased employees.

Insurance Law > Claims & Contracts > Premiums
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
Workers' Compensation & SSDI > Coverage > General Overview
[HN28]The premium for workers' compensation coverage is determined under the Texas Staff Leasing Services Act,

Tex. Lab. Code Ann. § 91.001 et seq., based on the client company's experience rating for the first two years of the client company's contract. Tex. Code Ann. § 91.042(b). But thereafter, the client company may obtain coverage for the leased employees, and the premium may be based on other factors in the circumstances described in the Act. Tex. Lab. Code Ann. § 91.042(e). If the leasing company elects not to obtain workers' compensation coverage, both the leasing company and its client are subject to Tex. Lab. Code Ann. § 406.033 with regard to the leased employees. Section 406.033 permits negligence suits and prevents the assertion of certain common law defenses by employers. Tex. Lab. Code Ann. § 91.042(d).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Contractors
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN29]The Texas Labor Code recognizes that a general contractor may procure workers' compensation coverage for subcontractors and subcontractors' employees. Tex. Lab. Code Ann. § 406.123(a). A motor carrier, defined at Tex. Lab. Code Ann. § 406.121(3), may provide workers' compensation to an owner operator, defined under Tex. Lab. Code Ann. § 406.121(4), and employees of an owner operator. Tex. Lab. Code Ann. § 406.123(c). Tex. Lab. Code Ann. § 406.121(a) provides that a written agreement to provide coverage makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of Texas. Tex. Lab. Code Ann. § 406.123(e).

Real Property Law > Construction Law > Contractors & Subcontractors
Torts > Premises Liability & Property > General Premises Liability > Defenses > Independent Contractors
Workers' Compensation & SSDI > Coverage > General Overview
[HN30]Provisions similar to Tex. Lab. Code Ann. § 406.123(e) were contained in prior legislation. 1989 Tex. Gen. Laws 1 and 1983 Tex. Gen. Laws 5210. That legislation has been construed to mean that when a premises owner agreed to procure workers' compensation coverage for its general contractor and the general contractor's subcontractor, a negligence suit by the subcontractor's employee against both the general contractor and the subcontractor was barred by the exclusive remedy provision of the workers' compensation legislation in effect in 1991.

Contracts Law > Types of Contracts > Lease Agreements > Personalty Leases > General Overview
Workers' Compensation & SSDI > Benefit Determinations > General Overview
Workers' Compensation & SSDI > Coverage > Actions Against Employers > Statutory Requirements
[HN31]The Texas Labor Code expressly recognizes the existence of employers who engage in the business of providing temporary workers to others. The Texas Labor Code does not abhor the concept of two employers for workers' compensation purposes. The Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., and Tex. Lab. Code Ann. § 406.123 (covering general contractors and subcontractors), like other workers' compensation provisions in the Texas Labor Code, encourage employers to obtain workers' compensation insurance coverage by providing benefits to the employer, including the exclusive remedy provision, if coverage is obtained. The Texas Staff Leasing Services Act. Tex. Lab. Code Ann. § 91.001 et seq., goes further and provides disincentives, such as removing common law defenses, if coverage is not obtained.

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Compensability > Injuries > General Overview
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > Employees & Employers
[HN32]The Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., has been adopted to provide prompt remuneration to employees who sustain injuries in the course and scope of their employment. The Act relieves employees of the burden of proving their employer's negligence, and instead provides timely compensation for injuries sustained on-the-job. In exchange for this prompt recovery, the Act prohibits an employee from seeking common-law remedies from his employer, as well as his employer's agents, servants, and employees, for personal injuries sustained in the course and scope of his employment. These purposes of the Act are carried out by recognizing that the express definitions of "employer" and "employee" and the exclusive remedy provision may apply to more than one employer.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
Workers' Compensation & SSDI > Defenses > General Overview
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity
[HN33]An employee injured while working under the direct supervision of a client company is conducting the business of both the general employer and that employer's client. The employee should be able to pursue workers' compensation benefits from either. If either has elected not to provide coverage, but still qualifies as an "employer" under the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., then that employer should be subject to common law liability without the benefit of the defenses enumerated in Tex. Lab. Code Ann. § 406.033. The purposes underlying the Act and its definitions of "employer" and "employee" indicate that the general employer is, and should be, an "employer" of a temporary worker even if a client company directs the details of that employee's work when the employee is injured.

Governments > State & Territorial Governments > Claims By & Against
Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview
[HN34]In a number of jurisdictions other than Texas, either by statute or case law, both a general employer and one who borrows that employer's employee are immune from common-law suit under statutory provisions similar to Texas's exclusive remedy provision, if one or both maintain workers' compensation coverage.

Labor & Employment Law > Employer Liability > Third Party Insurers
Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
[HN35]See Cal. Ins. Code § 11663.

Governments > State & Territorial Governments > Claims By & Against
Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
Workers' Compensation & SSDI > Remedies Under Other Laws > Common Law
[HN36]Under the Alaska special employment doctrine, temporary agency employees are employees of both the temporary agency and the company to which they are assigned. It has been implied that both companies are immune from negligence claims.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
Workers' Compensation & SSDI > Remedies Under Other Laws > Common Law
[HN37]Under Alabama law, there is a line of cases that for workers' compensation purposes a temporary services employee is the employee of both his or her general employer (i.e., the employment agency) and his or her special employer (i.e., the employer to which the employment agency assigned the employee to work.

Environmental Law > Water Quality > Clean Water Act > Coverage & Definitions > General Overview
Workers' Compensation & SSDI > Coverage > General Overview
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview
[HN38]Under Arizona law, when a labor contractor supplies or lends its employee to another employer, the result may be an arrangement in which one employee has two employers. The significance of this arrangement is that both employers are liable for workers' compensation and both are immune from tort liability for injuries received by the employee. The exclusivity of workers' compensation coverage as a remedy is based on the existence of an employment relationship. That relationship exists between the plaintiff and two employers. Thus, both the general and special employer are entitled to immunity under the exclusive remedy provision.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
Workers' Compensation & SSDI > Remedies Under Other Laws > Common Law
[HN39]Under Oklahoma law, it has been held that a construction worker was the employee of both the lending and

borrowing employer, and because the borrowing employer reimbursed the lender for compensation insurance costs, the borrower was immune from suit on common law claims.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN40]Under Rhode Island law, a general employer remains liable for workers' compensation benefits even though a special employer has control and direction over the employee's work and the employee is injured while operating equipment contrary to the general employer's instruction.

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN41]The appellate court finds nothing in the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., that precludes applying its definitions to both a general employer that provides temporary workers and that employer's client company when the general employer, its client, and the employee fit within the express definitions. To the contrary, the purposes of the Act are promoted in giving effect to definitions of "employer" and "employee" when they fit both a provider of temporary workers and its client.

Governments > Courts > Common Law
Labor & Employment Law > Employment Relationships > Employment at Will > Employees
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
[HN42]The common law has been dramatically engrafted upon by the legislature. Where the common law is revised by statute, the statute controls. The Texas Staff Leasing Services Act, Tex. Lab. Code Ann. § 91.001 et seq., can result as a practical matter in a split workforce, meaning that some employees have workers' compensation coverage while others do not. This does not deter the appellate court from applying the Act as written, even though there is a long common-law history prohibiting a split workforce.

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN43]The Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., has express definitions of "employer" and "employee" that should be given effect when applicable, even if that results in an employee's having more than one employer for purposes of workers' compensation. As we have seen, nothing in the Act provides that there must be only one "employer" for workers' compensation purposes. Furthermore, nothing in the common-law decisions of the appellate court is at odds with the concept that an employee may have two employers for workers' compensation purposes.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN44]Generally, courts determine whether the subscribing company is the worker's employer under the right-of-control test. But that statement cannot be lifted out of context and stretched to mean that there can be only one "employer" for workers' compensation purposes.

Torts > Vicarious Liability > Employers > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN45]The concept that there can be two employers for workers' compensation purposes is not foreclosed by the right to control principles that we have articulated in the tort context in analyzing respondeat-superior and borrowed-servant principles. A general employee of one employer may become the borrowed servant of another with respect to some

activities. The common-law principles that define when there will be vicarious liability are designed to assign liability for injury to third parties to the party who was directing the details of the negligent actor's conduct when that negligence occurred. Determining whether a general employer remains an "employer" for workers' compensation purposes while its employee is acting as the borrowed servant of another is not governed by the same concerns.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview
[HN46]At least two courts of appeals have concluded that the common-law right to control test does not deprive an employer of the benefit of the exclusive remedy provision in the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., when an employee is injured while the details of that employee's work are under the control of another.

Workers' Compensation & SSDI > Benefit Determinations > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Contractors
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview
[HN47]Where a worker is hired by one company that has contracted to do work for another, that company has a workers' compensation policy, and the worker receives benefits under that policy following an award by the Texas Workers' Compensation Commission, the worker's common law claim against that company is barred by the exclusive remedy provision in the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., even if control over the details of the work is in the hands of the other company with which that company has contracted.

Labor & Employment Law > Employment Relationships > Employment at Will > Employers
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > General Overview
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity
[HN48]Smith v. Otis Engineering Corp., 670 S.W.2d 750 (Tex. Civ. App. 1984) and Archem Co. v. Austin Industrial, Inc., 804 S.W.2d 268 (Tex. Civ. App. 1991) were incorrectly decided. Because the holdings in Smith and Archem that there can be only one employer for workers' compensation purposes are at odds with the purposes and policies of the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 et seq., those decisions are disapproved. The appellate court also disapproves of similar language in Coronado v. Schoenmann Produce Co., 99 S.W.3d 741 (Tex. Civ. App. 2003).

JUDGES: JUSTICE OWEN delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE JEFFERSON, JUSTICE SMITH and JUSTICE WAINWRIGHT joined. JUSTICE ENOCH filed a concurring opinion. JUSTICE SCHNEIDER did not participate in the decision.

OPINION BY: Priscilla R. Owen

OPINION

[*134] The issue in this case is whether an employee can have more than one employer [*135] for purposes of the Workers' Compensation Act and its exclusive remedy provision. [1] We conclude that there can be more than one employer, and that the trial court correctly granted summary judgment in favor of Wingfoot Enterprises d/b/a Tandem Staffing ("Tandem"), a temporary staffing provider that employed Marleny Alvarado. Because the court of appeals concluded otherwise, we reverse the court of appeals' judgment [2] and render judgment that Alvarado take nothing.

1 *See* TEX. LAB. CODE § 408.001.
2 53 S.W.3d 720.

[**2] **I**

Tandem is in the business of providing temporary general labor to various industrial companies. [3] Tandem had an oral agreement to provide temporary workers to Web Assembly, Inc. Under the agreement, Tandem had sole responsibility for all aspects of hiring, screening, and terminating employees sent to Web. Tandem was also responsible

for paying the employees' salaries, unemployment taxes, social security taxes, and for withholding federal income taxes. However, there was no express agreement regarding workers' compensation coverage for the temporary employees. There was evidence that Web "assumed" that Tandem's fees were sufficient to cover the cost of workers' compensation insurance.

3 Tandem is not, however, a "staff leasing services company" as defined and regulated by the Staff Leasing Services Act. *See* TEX. LAB. CODE §§ 91.001 *et seq*.

Tandem gave its employees details about their job assignments at Web and provided basic safety equipment and training. Tandem [**3] also had supervisors on-site at Web to check employees in, to get them started working promptly, to issue them proper safety equipment, and to monitor their breaks and lunch hours. Web supervised the specific tasks performed by the temporary employees, but Tandem retained the right to determine which employees would perform a particular task for Web, could substitute a different employee to perform a particular task, and could reassign an employee to another task.

Tandem hired Marleny Alvarado and, shortly thereafter, assigned her to do manual assembly work at Web's manufacturing facility. Web, however, assigned Alvarado to operate a staking or stamping machine. It was against Tandem's policy for its workers to operate industrial machinery, a policy of which Alvarado was aware. Alvarado did not notify Tandem about this job assignment or that the job was unsuitable or unsafe, as she was required to do, but there was evidence that Tandem's on-site supervisor knew Alvarado was operating the machine. About two days after Alvarado began working at Web's facility, the tips of three of her fingers were severed while she was operating the machine.

At the time of Alvarado's injury, Tandem [**4] maintained workers' compensation insurance coverage for Alvarado and its other employees. Web also had workers' compensation insurance coverage for its employees. Alvarado applied for and received workers' compensation benefits under Tandem's policy, but she subsequently sued Tandem, claiming that it was negligent and grossly negligent in a number of ways, alleging generally that Tandem failed to properly train and supervise her, warn her of dangers, and provide her with a safe workplace. Alvarado also sued Web.

Tandem moved for summary judgment [*136] under both Rule 166a(c) and 166a(i), [4] arguing, among other things, that there was no evidence to support Alvarado's claims or, alternatively, that the Texas Workers' Compensation Act's exclusive remedy provision barred Alvarado's claims because Tandem was Alvarado's employer or co-employer at the time she was injured. The day before trial, the trial court granted both of Tandem's motions for summary judgment without stating its reasons. The trial court did not sever Tandem from the case, but proceeded with a jury trial only on Alvarado's claims against Web. Tandem did not participate in the trial. The jury found that Alvarado was Web's "borrowed [**5] employee" at the time she was injured. The charge instructed the jury that "one who would otherwise be in the general employment of one employer is a 'borrowed employee' of another employer if such other employer or his agents have the right to direct and control the details of the particular work inquired about." Because Web had workers' compensation coverage, the trial court rendered final judgment in its favor based on the exclusive remedy provision of the Workers' Compensation Act. [5] That same judgment also made the prior summary judgments granted in favor of Tandem final, resulting in a take-nothing judgment against Alvarado.

4 TEX. R. CIV. P. 166a(c), (i).
5 *See* TEX. LAB. CODE § 408.001.

Alvarado appealed the summary judgment in favor of Tandem, but did not appeal the judgment in favor of Web. The court of appeals affirmed the summary judgment on Alvarado's gross negligence claim, but reversed the judgment on Alvarado's negligence claim, holding that there is some [**6] evidence to support that claim. [6] With regard to Tandem's contention that it is entitled to the protection of the exclusive remedy provision of the Workers' Compensation Act, the court of appeals concluded that an injured worker can have only one employer for workers' compensation purposes and found there is a fact question as to whether Tandem or Web was Alvarado's employer at the time she was injured, precluding summary judgment in Tandem's favor. [7] In so holding, the court of appeals applied a common-law "right to control" test and found that there is some evidence that both Tandem and Web had the right to control Alvarado's work when she was injured. [8] Because Alvarado did not appeal the adverse jury finding that she was Web's borrowed employee and because Tandem was not a party to the trial of that issue, the court of appeals did not address the jury's finding.

6 53 S.W.3d at 726-27.

7 *Id.* at 724-25.
8 *Id.*

Tandem filed a petition for review in this Court, [**7] reasserting both the exclusive remedy provision of the Workers' Compensation Act and, alternatively, the contention that there is no evidence that it was negligent. Alvarado does not seek review of the court of appeals' adverse judgment on her gross negligence claim. Therefore, the only claim before this Court is Alvarado's negligence claim against Tandem.

We granted Tandem's petition to resolve differing views among the courts of appeals as to whether a general employer [9] that provides workers' compensation coverage for an employee is precluded from relying on the exclusive remedy provision of the Workers' Compensation Act if the employee was injured while the details of [*137] the employee's work were under the control and supervision of another entity. [10] Because we conclude that Tandem was entitled to summary judgment based on the exclusive remedy provision, we do not consider Tandem's no evidence points.

9 We use the term "general employer" in this opinion to refer to a provider of temporary workers that employs a worker who is then assigned to work for a client of the provider.
10 *Compare* *Chapa v. Koch Ref. Co.*, 985 S.W.2d 158, 161 (Tex. App.-Corpus Christi 1998), *rev'd on other grounds*, 11 S.W.3d 153, 43 Tex. Sup. Ct. J. 204 (Tex. 1999) (holding that workers' compensation was injured worker's exclusive remedy against both the leasing company and the client company because both provided workers' compensation benefits, the worker recovered benefits from the leasing company, and the client company had the right to control the employee's work activities), *and* *Tex. Indus. Contractors, Inc. v. Ammean*, 18 S.W.3d 828, 831 (Tex. App.-Beaumont 2000, pet. dism'd by agr.) (holding that general employer was entitled to rely on the exclusive remedy provision even though there was some evidence that premises owner exercised control over the injury-producing activity because the general employer had workers' compensation insurance, and the injured employee accepted benefits under that policy), *with* *Coronado v. Schoenmann Produce Co.*, 99 S.W.3d 741, 753 (Tex. App.-Houston [14th Dist.] 2003, no pet.) (concluding that when "one entity borrows another's employee, workers' compensation law identifies one party as the 'employer' and treats all others as third parties"), *Alvarado*, 53 S.W.3d at 724-25 (holding that leasing company and client company were not co-employers of injured worker, and leasing company was not entitled to summary judgment based on the exclusive remedy provision because there was a fact question about whether the leasing company or the client company had the right to control the employee's activities when she was injured), *Archem Co. v. Austin Indus., Inc.*, 804 S.W.2d 268, 270-71 (Tex. App.-Houston [1st Dist.] 1991, no writ) (holding that an employee can have only one employer for workers' compensation purposes and that is the person or entity with the "right to control" the employee at the time of the accident), *and* *Smith v. Otis Eng'g Corp.*, 670 S.W.2d 750, 751-52 (Tex. App.-Houston [1st Dist.] 1984, no writ) (holding that the person or entity with the right to control the injured worker at the time of the accident is the only employer for workers' compensation purposes).

[**8] **II**

The starting point in our analysis is the Texas Workers' Compensation Act. [11] [HN1]The general definitions section of the Act defines an employer:

[HN2]"Employer" means, unless otherwise specified, a person who makes a contract of hire, employs one or more employees, and has workers' compensation insurance coverage. The term includes a governmental entity that self-insures, either individually or collectively. [12]

11 TEX. LAB. CODE §§ 401.001 *et seq*.
12 *Id.* § 401.011(18).

[HN3]

For purposes of the foregoing definition, an employer has "workers' compensation insurance coverage" if the employer has either obtained an approved insurance policy or secured the payment of compensation through self-insurance as provided under the Act. [13] In the sections of the Act dealing with coverage election, "employer" [**9] is defined as "a person who employs one or more employees." [14]

13 Section 401.011(44) defines "Workers' Compensation insurance coverage":

[HN4]"Workers' compensation insurance coverage" means:

(A) an approved insurance policy to secure the payment of compensation;

(B) coverage to secure the payment of compensation through self-insurance as provided by this subtitle; or

(C) coverage provided by a governmental entity to secure the payment of compensation.

Id. § 401.011(44).

14 *Id.* § 406.001.

The exclusive remedy provision of the Act says, [HN5]"Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or [*138] employee of the employer for the death of or a work-related injury sustained by the employee." [15] But [HN6]if an employer, i.e., "a person who employs one or more employees," [16] elects not to obtain workers' compensation insurance, that employer is subject to common-law [**10] negligence claims and may not assert certain defenses, including contributory negligence, assumed risk, or that the injury or death was caused by a fellow employee. [17]

15 *Id.* § 408.001(a).
16 *Id.* § 406.001.
17 *Id.* § 406.033.

The Act also defines "employee":

(a) [HN7]In this subtitle, "employee" means each person in the service of another under a contract of hire, whether express or implied, or oral or written.

(b) The term "employee" includes:

(1) an employee employed in the usual course and scope of the employer's business who is directed by the employer temporarily to perform services outside the usual course and scope of the employer's business;

(2) a person, other than an independent contractor or the employee of an independent contractor, who is engaged in construction, remodeling, or repair work for the employer at the premises of the employer; and

(3) a person who is a trainee under the Texans Work program established under Chapter 308.

(c) The term "employee" does not include:

[**11] (1) a master of or a seaman on a vessel engaged in interstate or foreign commerce; or

(2) a person whose employment is not in the usual course and scope of the employer's business. [18]

18 *Id.* § 401.012(a), (b), (c).

[HN8]The Workers' Compensation Act defines "course and scope of employment" to mean, in pertinent part, [HN9]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. The term includes an activity conducted on the premises of the employer or at other locations. . . . [19]

19 *Id.* § 401.011(12).

Alvarado concedes that she is Tandem's employee for some purposes, and the summary judgment evidence conclusively establishes that she is. [**12] Tandem made all decisions regarding Alvarado's employment, including whether to hire her, fire her, and determining the client companies for whom she would work. Tandem paid Alvarado's salary, withheld taxes, and provided training and benefits. At the time she was injured, Alvarado was working at Web's facility pursuant to Tandem's direction, to serve Tandem's business purposes. While at Web, Tandem provided some degree of on-site supervision and required Alvarado to report any unsafe conditions to Tandem and any deviations in job assignment to Tandem.

But Alvarado contends that when Web took control of the details of her work, she ceased to be an employee of Tandem for workers' compensation purposes. She argues that when one entity "borrows" another's employee, workers' compensation law identifies one party as the employer and treats all others as third parties, citing *Smith v. Otis*

Engineering Corp. [20] and *Archem* [*139] *Co. v. Austin Industrial, Inc.* [21] Alvarado therefore contends that there can be only one employer to which the exclusive remedy provision of the Act applies. Alvarado argues that because there is evidence that Web controlled the details of her work, and indeed, [**13] a jury found that Web was her employer after summary judgment had been rendered in favor of Tandem, summary judgment for Tandem was improper.

20 670 S.W.2d 750, 751 (Tex. App.-Houston [1st Dist. 1984], no writ).
21 804 S.W.2d 268, 269 (Tex. App.-Houston [1st Dist. 1991], no writ).

The jury's finding that Web was Alvarado's employer is not before us, and that finding is not binding on Tandem, who was not a party to the trial. [22] We agree, however, that there was summary judgment evidence that Web controlled the details of Alvarado's work at the time of her injury. Indeed, Tandem concedes as much. We assume, without deciding, that Alvarado was Web's borrowed employee because it had the right to control and did control the details of Alvarado's work at the time she was injured. The question we must decide is whether, for purposes of workers' compensation, a general employer like Tandem remains an "employer" within the meaning of the Act and thus whether the exclusive remedy [**14] provision can apply to both the general employer and one who has become an employer by controlling the details of a worker's work at the time of injury.

22 *Cf. Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652-53, 39 Tex. Sup. Ct. J. 351 (Tex. 1996) [HN10](*res judicata* prevents the relitigation of a claim or cause of action that has been finally adjudicated in an earlier suit, but only when the parties in the first suit are the same as those in the second suit or are in privity with them).

As we said in *Texas Workers' Compensation Insurance Fund v. Del Industrial, Inc.*, [HN11]we apply the Act as written in determining workers' compensation issues, [23] and it is the Act to which we must look as our starting point. Tandem, as Alvarado's general employer, and Alvarado fall squarely within the Act's definitions of employer and employee. [24] Tandem employed Alvarado and provided workers' compensation insurance coverage for her. [25] She was acting in furtherance of Tandem's business while she was working at its client company, [**15] Web. Although Tandem's president testified that he thought Alvarado was outside the course and scope of her employment because she was operating an industrial machine at the time of her injury in violation of Tandem's company policy, that opinion does not undercut the undisputed facts. Tandem hired Alvarado for the purpose of sending her to its clients to work as a laborer. The fact that she disobeyed directives from Tandem about operating machinery while she was on the job did not take her out of the course and scope of her employment with Tandem. [26]

23 35 S.W.3d 591, 596, 43 Tex. Sup. Ct. J. 589 (Tex. 2000).
24 TEX. LAB. CODE. §§ 401.011(18), 406.011.
25 *See id.*
26 *See Md. Cas. Co. v. Brown*, 131 Tex. 404, 115 S.W.2d 394, 397 (Tex. 1938) [HN12]("While it seems to be the rule that a violation of instructions of an employer by an employee will not destroy the right to compensation, if the instructions relate merely to the manner of doing work, yet it seems to be held by the weight of authority that violation of instructions which are intended to limit the scope of employment will prevent a recovery of compensation."); *Brown v. Forum Ins. Co.*, 507 S.W.2d 576, 577 (Tex. Civ. App.-Dallas 1974, no writ) (employee killed while flying a private plane in furtherance of employer's work was still in the course of his employment in spite of the company rule against using private or chartered aircraft in connection with work duties).

[**16] Neither the definitions of "employer" and "employee" under the Act nor the exclusive remedy provision expressly forecloses [*140] the possibility that there may be more than one employer. The definitions do not provide that a general employer ceases to be the employee's employer for workers' compensation purposes when another person exercises control over the details of the employee's work and the employee is thereby expressly or impliedly in the service of that third person under a contract of hire. [27] And [HN13]in examining the Labor Code's overall scheme for workers' compensation and for protecting workers, [28] we conclude that the Act's decided bias in favor of employers electing to provide coverage for their employees supports our conclusion that the Act permits more than one employer for workers' compensation purposes.

27 *See* TEX. LAB. CODE §§ 401.011(18), 406.001, 401.012(a).
28 *Del Indus., Inc.*, 35 S.W.3d at 593 (citing *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133, 37 Tex. Sup. Ct. J. 1001 (Tex. 1994)).

[**17] [HN14]The Texas Labor Code recognizes that an employer may be in the business of providing temporary

workers to others. The Code defines [HN15]"Temporary common worker employer" as "a person who provides common workers to a user of common workers. The term includes a temporary common worker agent or temporary common worker agency." [29] The Code defines "common worker":

(3) [HN16]"Common worker" means an individual who performs labor involving physical tasks that do not require:

(A) a particular skill;

(B) training in a particular occupation, craft, or trade; or

(C) practical knowledge of the principles or processes of an art, science, craft, or trade. [30]

A "user of common workers" is also defined: [HN17]"'User of common workers' means a person who uses the services of a common worker provided by a temporary common worker employer." [31] [HN18]There is some regulation of temporary common worker employers under Chapter 92 of the Code, [32] but it is not as extensive as the regulation of a staff leasing service provider under Chapter 91 of the Code.

29 TEX. LAB. CODE § 92.002(7).

[**18]

30 *Id.* § 92.002(3)
31 *Id.* § 92.002(8).
32 *See id.* §§ 92.002, 92.011, 92.012, 92.022, 92.024, 92.025.

[HN19]The Staff Leasing Services Act, by definition, does not cover the providers of temporary workers. The term "Staff leasing services" [HN20]"does not include . . . temporary help . . . or . . . a temporary common worker employer as defined by Chapter 92." [33] [HN21]The Staff Leasing Services Act applies to arrangements in which "the employee's assignment is intended to be of a long-term or continuing nature, rather than temporary or seasonal in nature, and a majority of the work force at a client company worksite or a specialized group within that work force consists of assigned employees of the license holder." [34]

33 *Id.* § 91.001(14)(A), (D).
[**19]
34 *Id.* § 91.001(14).

[HN22]The Staff Leasing Services Act contemplates that one workers' compensation policy procured by the staff leasing service company will cover employees leased to a client company, and that both the leasing company and the client may rely on the exclusive remedy provision of the Workers' Compensation Act. [35]

35 *See id.* § 91.006(a) [HN23]("A certificate of insurance coverage showing that a license holder maintains a policy of workers' compensation insurance constitutes proof of workers' compensation insurance coverage for the license holder and the client company with respect to all employees of the license holder assigned to the client company."); *id.* § 91.042(d) [HN24](explaining that license holder elects for both itself and a client company whether to provide workers' compensation insurance).

[*141] Tandem does not qualify as a staff leasing service provider under the Staff Leasing Services Act because [**20] that Act was not intended to apply to providers like Tandem. However, the substantive provisions of and policies underlying the Staff Leasing Services Act are instructive. [HN25]The Labor Code expressly addresses "co-employees" in that Act. [36] Staff leasing service companies do not meet the requirement of that Act unless "employment responsibilities are in fact shared by the license holder and the client company." [37] A contract between a staff leasing service company and a client must provide that the leasing company "shares, as provided by Subsection (b), with the client company the right of direction and control over employees assigned to a client's worksites." [38] The referenced subsection (b) says:

(b) [HN26]Notwithstanding any other provision of this chapter, a client company retains responsibility for:

(1) the direction and control of assigned employees as necessary to conduct the client company's business, discharge any applicable fiduciary duty, or comply with any licensure, regulatory, or statutory requirement . . . . [39]

36 TEX. LAB. CODE §§ 91.001 *et seq*.

37 *Id.* § 91.001(14).

[**21]

38 *Id.* § 91.032(a)(1).

39 *Id.* § 91.032(b)(1).

As we explained in *Del Industrial, Inc.*, [HN27]under the Staff Leasing Services Act, a staff leasing company makes the election of whether to provide workers' compensation insurance coverage for both itself and the client company for the employees it leases. [40] If a leasing company elects coverage, its policy covers both the leasing company and its client company as to the leased employees. [41] [HN28]The premium for workers' compensation coverage is determined under the Staff Leasing Services Act based on the client company's experience rating for the first two years of the client company's contract. [42] But thereafter, the client company may obtain coverage for the leased employees, and the premium may be based on other factors in the circumstances described in the Act. [43] If the leasing company elects not to obtain workers' compensation coverage, both the leasing company [**22] and its client are subject to section 406.033 of the Code with regard to the leased employees. Section 406.033 permits negligence suits and prevents the assertion of certain common law defenses by employers. [44]

40 35 S.W.3d 591, 594, 43 Tex. Sup. Ct. J. 589 (Tex. 2000).

41 *Id.*

42 TEX. LAB. CODE § 91.042(b).

43 *Id.* § 91.042(e).

44 *Id.* § 91.042(d); *see also* *Del Indus., Inc.*, 35 S.W.3d at 594.

[HN29]The Labor Code also recognizes that a general contractor may procure workers' compensation coverage for subcontractors and subcontractors' employees. [45] And a motor carrier [46] may provide workers' compensation to an owner operator [47] and employees of an owner operator. [48] The Code [*142] provides that a written agreement [49] to provide coverage "makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of this state." [50] [HN30]Similar provisions were contained in prior [**23] legislation. [51] That legislation was construed to mean that when a premises owner agreed to procure workers' compensation coverage for its general contractor and the general contractor's subcontractor, a negligence suit by the subcontractor's employee against both the general contractor and the subcontractor was barred by the exclusive remedy provision of the workers' compensation legislation in effect in 1991. [52]

45 TEX. LAB. CODE § 406.123(a).

46 *Id.* § 406.121(3) (defining "Motor carrier").

47 *Id.* § 406.121(4) (defining "Owner operator").

48 *Id.* § 406.123(c).

49 *Id.* § 406.121(a).

50 *Id.* § 406.123(e).

51 *See* Act of Dec. 11, 1989, 71st Leg., 2d C.S., ch. 1, 1989 Tex. Gen. Laws 1, 15-16; *see also* Act of May 26, 1983, 68th Leg., R.S., ch. 950, 1983 Tex. Gen. Laws 5210, 5210-11.

52 *Williams v. Brown & Root, Inc.*, 947 S.W.2d 673, 675-77 (Tex. App.-Texarkana 1997, no writ).

From an examination [**24] of Chapter 92, which expressly contemplates the existence of temporary common worker employers, the Staff Leasing Services Act, and the provisions of the Code that deal with general contractors, subcontractors, and their employees, we glean at least three things. First, [HN31]the Labor Code expressly recognizes the existence of employers who engage in the business of providing temporary workers to others. Second, the Labor Code does not abhor the concept of two employers for workers' compensation purposes. Third, the Staff Leasing Services Act and section 406.123 (covering general contractors and subcontractors), like other workers' compensation provisions in the Code, encourage employers to obtain workers' compensation insurance coverage by providing benefits to the employer, including the exclusive remedy provision, if coverage is obtained. The Staff Leasing Services Act goes further and provides disincentives, such as removing common law defenses, if coverage is not obtained.

We recognized the benefits of workers' compensation coverage to both employees and employers in *Hughes Wood Products, Inc. v. Wagner*. [53] We said there that:

[HN32]The workers' compensation act was adopted to provide [**25] prompt remuneration to employees who sustain injuries in the course and scope of their employment. . . . The act relieves employees of the burden of proving their employer's negligence, and instead provides timely compensation for injuries sustained on-the-job. . . . In

exchange for this prompt recovery, the act prohibits an employee from seeking common-law remedies from his employer, as well as his employer's agents, servants, and employees, for personal injuries sustained in the course and scope of his employment. [54]

These purposes of the Act are carried out by recognizing that the express definitions of "employer" and "employee" and the exclusive remedy provision may apply to more than one employer. An employee in Alvarado's situation will be working for her general employer (i.e., the temporary staffing provider), but will also be subjected to laboring in the workplace and under [*143] the direction of the general employer's client company. Some client companies may carry workers' compensation insurance while others may not. [HN33]An employee injured while working under the direct supervision of a client company is conducting the business of both the general employer and that employer's [**26] client. The employee should be able to pursue workers' compensation benefits from either. If either has elected not to provide coverage, but still qualifies as an "employer" under the Act, then that employer should be subject to common law liability without the benefit of the defenses enumerated in section 406.033. Temporary workers by definition move from one client company to another. They do not know who will be directing their work from day to day. The only constant in their work is that they are employed by their general employer, to whom they look for payment of wages and their work assignments. The purposes underlying the Workers' Compensation Act and its definitions of "employer" and "employee" indicate that the general employer is, and should be, an "employer" of a temporary worker even if a client company directs the details of that employee's work when the employee is injured. Further, an employee should not be placed in the position of trying to determine, perhaps at his or her peril, which of two entities was his or her employer on any given day or at any given moment during a day.

53 18 S.W.3d 202, 206, 43 Tex. Sup. Ct. J. 595 (Tex. 2000).

[**27]

54 *Id.* at 206-07 (quoting *Darensburg v. Tobey*, 887 S.W.2d 84, 86 (Tex. App.-Dallas 1994, writ denied) (citing *Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 739, 24 Tex. Sup. Ct. J. 96 (Tex. 1980))); *Paradissis v. Royal Indem. Co.*, 507 S.W.2d 526, 529, 17 Tex. Sup. Ct. J. 163 (Tex. 1974); *see also Tex. Workers Comp. Commn v. Garcia*, 893 S.W.2d 504, 511, 38 Tex. Sup. Ct. J. 235 (Tex. 1995).

We note that [HN34]in a number of other jurisdictions, either by statute or case law, both a general employer and one who borrows that employer's employee are immune from common-law suit under statutory provisions similar to Texas's exclusive remedy provision, if one or both maintain workers' compensation coverage. [55]

55 *See generally* LARSON, LARSON'S WORKERS' COMPENSATION LAW § 67.04D (2003); *see also* CAL. INS. CODE § 11663 [HN35]("As between insurers of general and special employers, one which insures the liability of the general employer is liable for the entire cost of compensation payable on account of injury occurring in the course of and arising out of general and special employments unless the special employer had the employee on his or her payroll at the time of injury, in which case the insurer of the special employer is solely liable."); *Anderson v. Tuboscope Vetco, Inc.*, 9 P.3d 1013, 1017 (Alaska 2000) (stating that [HN36]under the special employment doctrine, temporary agency employees are employees of both the temporary agency and the company to which they are assigned and implying that both companies are immune from negligence claims); *Marlow v. Mid S. Tool Co., Inc.*, 535 So. 2d 120, 123 (Ala. 1988) (stating that the court had established in [HN37]a line of cases that for workers' compensation purposes "a temporary services employee is the employee of *both* his or her *general employer* (i.e., the employment agency) and his or her *special employer* (i.e., the employer to which the employment agency assigned the employee to work")); *Araiza v. U.S. W. Bus. Res., Inc.*, 183 Ariz. 448, 904 P.2d 1272, 1276 (Ariz. Ct. App. 1995) [HN38]("When a labor contractor such as Manpower supplies or 'lends' its employee to another employer, the result may be an arrangement in which one employee has two employers. . . . The significance of this arrangement is that both employers are liable for workers' compensation and both are immune from tort liability for injuries received by the employee . . . ."); *Avila v. Northrup King Co.*, 179 Ariz. 497, 871 P.2d 748 (Ariz. Ct. App. 1994) ("The exclusivity of workers' compensation coverage as a remedy is based on the existence of an employment relationship. That relationship exists between [the plaintiff] and two employers . . . . Thus, both his general and special employer are entitled to immunity under [the exclusive remedy provision]."); *Ragsdale v. Wheelabrator Clean Water Sys., Inc.*, 1998 OK CIV APP 58, 959 P.2d 20, 22-23 (Okla. Ct. App. 1998); *Blacknall v. Westwood Corp.*, 307 Ore. 113, 764 P.2d 544, 545-47 (Or. 1988) [HN39](construction worker was the employee of both the lending and borrowing employer, and because the borrowing employer reimbursed the lender for compensation insurance costs, the

borrower was immune from suit on common law claims); *cf.* *D'Andrea v. Manpower, Inc. of Providence*, 105 R.I. 108, 249 A.2d 896, 898-99 (R.I. 1969) [HN40](general employer remained liable for workers' compensation benefits even though special employer had control and direction over the employee's work and employee was injured while operating equipment contrary to the general employer's instruction).

[**28] [HN41] [*144] We find nothing in the Texas Workers' Compensation Act that would preclude applying its definitions to both a general employer that provides temporary workers and that employer's client company when the general employer, its client, and the employee fit within the express definitions. To the contrary, the purposes of the Act are promoted in giving effect to definitions of "employer" and "employee" when they fit both a provider of temporary workers and its client.

We think it prudent to emphasize that we are deciding today only whether there may be two employers for workers' compensation purposes when a provider of temporary workers furnishes a worker to a client that controlled the details of the work at the time the worker was injured and there was no agreement between the provider of temporary workers and the client regarding workers' compensation coverage. We are aware that there are decisions from Texas courts of appeals that have held that when an employer provides workers to client companies and agrees to procure workers' compensation coverage for those workers, the client company is considered to be the employer for purposes of the exclusive remedy provision of the workers' [**29] compensation law if the staffing provider actually procured such coverage and the employee was under the direct control of the client or was the client's borrowed servant. [56] In a case applying the law in effect before the Staff Leasing Services Act became effective, another court of appeals held that a client company who controlled the details of an employee's work when her injury occurred was an employer for purposes of the exclusive remedy bar, even though a leasing company carried the employee on its workers' compensation policy under an agreement with its client, and the leasing company was the insured rather than the client. [57] In another case applying the law in effect before the Staff Leasing Services Act became effective, a court of appeals held that an agreement regarding workers' compensation coverage that essentially would have met the requirements of the Staff Leasing Services Act, had it been in effect, was enforceable, and that the injured employee's suit against both the leasing company and its client was barred. [58] And another court of appeals has held that there can be co-employers for workers' compensation purposes when a temporary employment [*145] agency agreed in [**30] a written contract with its client to provide workers' compensation insurance for the temporary employee, and did in fact pay benefits, but the client controlled the details of the injured employee's work. [59] The court in that case held that the client was entitled to immunity based on the exclusive remedy provision of the Workers' Compensation Act. [60] None of the issues presented in the foregoing cases are before us today, and we express no opinion on those issues.

56 *Rodriguez v. Martin Landscape Mgmt. Inc.*, 882 S.W.2d 602, 605-06 (Tex. App.-Houston [1st Dist.] 1994, no writ); *Gibson v. Grocers Supply Co., Inc.*, 866 S.W.2d 757, 760 (Tex. App.-Houston [14th Dist.] 1993, no writ); *Marshall v. Toys-R-Us Nytex, Inc.*, 825 S.W.2d 193, 196 (Tex. App.-Houston [14th Dist.] 1992, writ denied); *Denison v. Haeber Roofing Co.*, 767 S.W.2d 862, 864-65 (Tex. App.-Corpus Christi 1989, no writ); *see also* *Guerrero v. Standard Alloys Mfg. Co.*, 566 S.W.2d 100, 102 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.) (holding there was a fact question about whether client company had a right to control employee and therefore whether it could assert exclusive remedy provision based on workers' compensation policy obtained by general employer who supplied contract labor).

[**31]

57 *Pederson v. Apple Corrugated Packaging, Inc.*, 874 S.W.2d 135, 137-38 (Tex. App.-Eastland 1994, writ denied).

58 *Brown v. Aztec Rig Equip., Inc.*, 921 S.W.2d 835, 840, 847 (Tex. App.-Houston [14th Dist.] 1996, writ denied); *see also* *Cherry v. Chustz*, 715 S.W.2d 742, 743-44 (Tex. App.-Dallas 1986, no writ) (holding that independent contractor could assert the exclusive remedy bar in a suit by its employee even though the company that retained the contractor paid the workers' compensation premiums).

59 *Garza v. Excel Logistics, Inc.*, 100 S.W.3d 280, 287-88 (Tex. App.-Houston [1st Dist.] 2002, pet. filed).

60 *Id.*

We turn to Alvarado's argument that the common-law doctrine of right to control should govern this case.

III

We recognized in *Del Industrial, Inc.* that [HN42]"'the common law has been dramatically engrafted upon by the Legislature. Where the common law is revised by statute, the statute controls.'" [61] In *Del*, we held that the Staff Leasing Services Act could result as a practical matter [**32] in a split workforce, meaning that some employees had workers'

compensation coverage while others did not. [62] This did not deter us from applying the Act as written, even though there was a long common-law history prohibiting a split workforce. [63]

61 35 S.W.3d 591, 596, 43 Tex. Sup. Ct. J. 589 (Tex. 2000) (quoting *Bartley v. Guillot*, 990 S.W.2d 481, 485 (Tex. App.-Houston [14th Dist.] 1999, pet. denied)).
62 *Id*.
63 *Id*.

As discussed above, [HN43]the Workers' Compensation Act has express definitions of "employer" and "employee" that should be given effect when applicable, even if that results in an employee's having more than one employer for purposes of workers' compensation. As we have seen, nothing in the Act provides that there must be only one "employer" for workers' compensation purposes. Furthermore, nothing in the common-law decisions of this Court is at odds with the concept that an employee may have two employers for workers' compensation purposes.

We said in *Del Industrial,* [**33] *Inc.* that [HN44]"generally, courts determine whether . . . the subscribing company is the worker's employer under the right-of-control test," [64] citing our decision in *Thompson v. Travelers Indemnity Co. of Rhode Island.* [65] But that statement cannot be lifted out of context and stretched to mean that there can be only one "employer" for workers' compensation purposes. In *Thompson*, the issue was whether a jockey was an employee of the racetrack or an independent contractor. [66] The jockey sought to obtain workers' compensation benefits under the racetrack's policy, and the compensation carrier contested his status as an employee. We held that he was not an employee, but rather was an independent contractor. [67] Alvarado was not an independent contractor for Tandem, and no one in this case claims that she was. The evidence shows that Alvarado was hired by a temporary staffing company with all the indicia of an employee, worked for the staffing company at its client's place of business, and was directed in the details of her work by the client. Alvarado had two "employers" for workers' compensation purposes.

64 *Id*. at 595.
[**34]
65 789 S.W.2d 277, 278, 33 Tex. Sup. Ct. J. 478 (Tex. 1990).
66 *Id*.
67 *Id*. at 279.

[*146] Nor is [HN45]the concept that there can be two employers for workers' compensation purposes foreclosed by the right to control principles that we have articulated in the tort context in analyzing respondeat-superior and borrowed-servant principles. We have said that a general employee of one employer may become the borrowed servant of another with respect to *some* activities. [68] The common-law principles that define when there will be vicarious liability are designed to assign liability for injury to third parties to the party who was directing the details of the negligent actor's conduct when that negligence occurred. Determining whether a general employer remains an "employer" for workers' compensation purposes while its employee is acting as the borrowed servant of another is not governed by the same concerns, as we have set forth above.

68 *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 537, 46 Tex. Sup. Ct. J. 142 (Tex. 2002) (plurality opinion) (citing *Sparger v. Worley Hosp., Inc.*, 547 S.W.2d 582, 583, 20 Tex. Sup. Ct. J. 143 (Tex. 1977) and *Producers Chem. Co. v. McKay*, 366 S.W.2d 220, 225, 6 Tex. Sup. Ct. J. 292 (Tex. 1963)).

[**35] In *Exxon Corp. v. Perez*, we addressed the parameters of the borrowed-servant doctrine in the context of the borrowing entity's claim that it was entitled to rely on the exclusive remedy provision of the former workers' compensation act. [69] Perez, an employee of Hancock, was injured on a jobsite and sued Exxon. Exxon contended that Perez was its borrowed servant, and that since it was a workers' compensation insurance subscriber, the exclusive remedy provision immunized it from common-law negligence claims. [70] We held that there was a fact question about whether Perez was Exxon's borrowed servant and that the trial court therefore should have submitted an issue to the jury. [71] We did not consider in any way whether Perez's employer, Hancock, would be precluded from relying on the exclusive remedy provision if Perez were found to be Exxon's borrowed servant.

69 842 S.W.2d 629, 630, 35 Tex. Sup. Ct. J. 1120 (Tex. 1992).
70 *Id.*
71 *Id*. at 630-31.

[HN46]At least two courts of appeals have concluded [**36] that the common-law right to control test did not

deprive an employer of the benefit of the Act's exclusive remedy provision when an employee was injured while the details of that employee's work were under the control of another. The first of these cases, *Chapa v. Koch Refining Co.*, [72] was decided under the former version of the Texas Workers' Compensation Act. [73] Chapa was employed by an employee leasing company, Stafftek. Stafftek supplied Chapa as a worker to H & S, who in turn had been retained as an independent contractor by Koch. Chapa was injured on Koch's premises. Chapa's general employer, Stafftek, was a subscriber under the Workers' Compensation Act, as was H & S. Chapa sued Stafftek, H & S, and Koch. The court of appeals first held that Chapa was H & S's borrowed servant. [74] But because H & S provided coverage to Chapa under a workers' compensation policy, the court held that the exclusive remedy provision applied and "insulated [H & S] from suits for damages for personal injuries." [75] Chapa had received [*147] benefits, however, under Stafftek's policy, not H & S's. [76] The court of appeals concluded that the Act's exclusive remedy provision applied to Stafftek as [**37] well as H & S. [77] This Court reversed the court of appeals, but only with regard to its holdings as to Koch's liability. [78] None of the issues regarding workers' compensation or the exclusive remedy provision were before us.

72 985 S.W.2d 158 (Tex. App.-Corpus Christi 1998), *rev'd on other grounds*, 11 S.W.3d 153, 43 Tex. Sup. Ct. J. 204 (Tex. 1999).
73 *See id.* at 161 (applying Act of Dec. 13, 1989, 71st Leg., 2d C.S., ch. 1, § 4.01, 1989 Tex. Gen. Laws 32, *repealed by* Act of May 22, 1993, 73rd Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 1175 (current version at TEX. LAB. CODE § 408.001)).
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 157, 43 Tex. Sup. Ct. J. 204 (Tex. 1999).

In another case, *Texas Industrial Contractors, Inc. v. Ammean*, [79] Ammean was employed by Texas Contractors. Texas Contractors was hired as an independent contractor by Bayer. Ammean was injured while [**38] working on Bayer's premises. The court of appeals held that a reasonable jury could conclude that Bayer exercised actual control over Texas Contractor's activities that resulted in Ammean's injury. [80] The court nevertheless held that Texas Contractors was entitled to rely on the exclusive remedy provision of the Workers' Compensation Act because Texas Contractors had a workers' compensation policy and Ammean had received benefits under it. [81] The Beaumont Court of Appeals seems to have based its decision on the fact that the employee had elected to pursue a claim for workers' compensation from its employer rather than a common-law suit and was bound by that election. [82] That court concluded:

> Ammean argues the exclusive remedy provision does not prevent him from recovering against Texas Contractors at common law because Bayer was his true employer since it controlled the details of his work and because he did not make an informed election of remedies. [HN47]Where, however, a worker is hired by one company that has contracted to do work for another, that company has a workers' compensation policy, and the worker receives benefits under that policy following an award by the Texas Workers' [**39] Compensation Commission, the worker's common law claim against that company is barred by the Act's exclusive remedy provision, even if control over the details of the work is in the hands of the other company with which that company has contracted.
>
> . . . .
>
> In any event, Ammean brought this common law claim after he had sought and obtained, with the assistance of an attorney, workers' compensation benefits. No appeal was taken from the award. [83]

79 18 S.W.3d 828 (Tex. App.-Beaumont 2000, pet. dism'd by agr.).
80 *Id.* at 833-34.
81 *Id.* at 831.
82 *See id.*
83 *Id.* at 831-32.

Two other court of appeals decisions have applied reasoning that is at odds with the reasoning in *Chapa* and *Ammean*. In *Smith v. Otis Engineering Corp.*, decided under the [**40] former workers' compensation statutes, Smith was "in the general employ" of Stewart Well Service Company. [84] Smith was injured while he was unloading equipment from a truck owned by Otis Engineering. Otis's workers' compensation carrier provided benefits to Smith, which he accepted, and Smith executed a release in favor of Otis. Smith then sued Otis, Stewart Well Service, and another [*148] entity. Otis filed a motion for summary judgment, contending Smith was its borrowed servant as a matter of law and

therefore that it was Smith's employer for purposes of the workers' compensation bar of common-law negligence claims. [85] The trial court granted Otis's summary judgment motion, but the court of appeals reversed, holding that whether Smith was Otis's borrowed servant was a fact issue. [86] Part of the rationale for that holding was the court's conclusion that the law "requires that one party be named the employer and all others be classified as third parties outside the purview of the workers' compensation law." [87] But the case the court cited for that proposition, *Associated Indemnity Co. v. Hartford Accident & Indemnity Co.*, [88] did not make such a holding, as the concurring opinion [**41] in the case before us today pointed out. [89] In fact, the decision in *Hartford* expressly said that it was not required to decide whether to "reject the dual-employment theory and apply the right-of-control test . . . ." [90]

84 670 S.W.2d 750, 751 (Tex. App.-Houston [1st Dist.] 1984, no writ).
85 *Id*.
86 *Id*. at 752.
87 *Id*. at 751.
88 524 S.W.2d 373, 376 (Tex. Civ. App.-Dallas 1975, no writ).
89 53 S.W.3d at 729 (Taft, J., concurring).
90 524 S.W.2d at 376.

The same court that decided *Smith* subsequently decided *Archem Co. v. Austin Industrial, Inc.* [91] In that case, Vallejo was employed by Austin Industrial, who supplied temporary labor. Austin Industrial's client was Archem, and Vallejo was injured while working at Archem's premises. Vallejo sued Archem and Austin, both of whom contended that because they were workers' compensation subscribers, Vallejo's claims were barred [**42] by the exclusive remedy provision. [92] Austin Industrial filed a motion for summary judgment, which the trial court granted. Citing its decision in *Smith*, the court of appeals reversed, saying that "where one entity 'borrows' another's employee, workers' compensation law identifies one party as the 'employer' and treats all others as third parties." [93] The court held that there was a fact question of whether Austin Industrial or Archem was Vallejo's employer at the time he was injured. [94]

91 804 S.W.2d 268 (Tex. App.-Houston [1st Dist.] 1991, no writ).
92 *Id.* at 269.
93 *Id*.
94 *Id*. at 271.

The single employer theory from *Smith* and *Archem* was embraced in *Coronado v. Schoenmann Produce Co.* [95] That case did not concern a provider of workers to clients, but rather, which of two affiliated companies was the employer. [96] The court in that case stated that "for liability purposes, where one entity 'borrows' another's employee, [**43] workers' compensation law identifies one party as the 'employer' and treats all others as third parties." [97] The court ultimately held that there was no evidence that the defendant exercised any control over the details of the plaintiff's work at the time of the injury. [98]

95 99 S.W.3d 741 (Tex. App.-Houston [14th Dist.] 2003, no pet.).
96 *Id.* at 744.
97 *Id.* at 753.
98 *Id.* at 757.

The same court that decided *Smith* and *Archem* decided the case before us today. The author of the court of appeals' opinion in this case took the unusual but not unprecedented [*149] step [99] of concurring to the court's opinion. [100] JUSTICE TAFT criticized the court of appeals' prior decisions in *Smith* and *Archem* as being inconsistent with the purposes of the workers' compensation scheme enacted by the Legislature. [101] JUSTICE TAFT said that if he "were writing on a clean slate," [102] he would have reached a different result:

For these [**44] reasons, I reluctantly follow the rule we articulated in *Smith* and *Archem*. If I were writing on a clean slate, however, I would decide this case by adopting the holding of *Texas Industrial Contractors, Inc. v. Ammean*, 18 S.W.3d 828 (Tex. App.-Beaumont 2000, pet. [dism'd by agr.]) that,

[when], however, a worker is hired by one company that has contracted to do work for another, that company has a workers' compensation policy, and the worker receives benefits under that policy following an award by the Texas Workers' Compensation Commission, the worker's common law claim against that company is barred by the [Labor Code's] exclusive remedy provision, even if control over the details of the work is in the hands of the other company with which that company has contracted.

99 *See* *Casso v. Brand*, 776 S.W.2d 551, 32 Tex. Sup. Ct. J. 366 (Tex. 1989) (Phillips, C.J., authoring both the majority opinion and a dissenting opinion).
100 53 S.W.3d at 727 (Taft, J., concurring).
101 *Id.* at 730.
102 *Id.*

[**45] *Id.* at 831; *Chapa v. Koch Refining Co.*, 985 S.W.2d 158, 161 (Tex. App.-Corpus Christi 1998), *rev'd on other grounds*, 11 S.W.3d 153, 43 Tex. Sup. Ct. J. 204 (Tex. 1999). This result gives effect to the policy behind the workers' compensation statute, which deprives the injured employee of a subscriber of many common law rights in return for prompt compensation benefits and medical treatment. . . . Accordingly, I believe that applying the above holding to this case would yield a fairer result and comport with legislative intent. [103]

103 *Id.* at 730-31.

We agree with the concurring opinion in the court of appeals in this case that [HN48]*Smith* and *Archem* were incorrectly decided. Because the holding in *Smith* [104] and *Archem* [105] that there can be only one employer for workers' compensation purposes is at odds with the purposes and policies of the Workers' Compensation Act and with this opinion, we disapprove of those decisions. We also disapprove of similar language in *Coronado v. Schoenmann* [**46] *Produce Co.* [106] Alvarado was Tandem's employee for workers' compensation purposes because she and Tandem fell within the respective definitions of "employee" and "employer" under the Act. The fact that Web actually controlled the details of Alvarado's work at the time she was injured, and thus was also an employer within the meaning of the Act, does not preclude the applicability of the Act's provisions, including the exclusive remedy provision, to both Tandem and Web.

104 670 S.W.2d 750, 751 (Tex. App.-Houston [1st Dist.] 1984, no writ).
105 804 S.W.2d 268, 271 (Tex. App.-Houston [1st Dist.] 1991, no writ).
106 99 S.W.3d 741, 753 (Tex. App.-Houston [14th Dist.] 2003, no pet.).

* * * * *

For the foregoing reasons, the trial court properly granted summary judgment in favor of Tandem. Accordingly, we reverse the court of appeals' judgment and render judgment that Alvarado take nothing.

Priscilla R. Owen

Justice

CONCUR BY: Craig T. Enoch

CONCUR

[*150] [**47] JUSTICE ENOCH, concurring.

I agree with the Court that the "right-to-control" test should be rejected as the test to apply when determining who the "employer" is in the workers' compensation context. Unfortunately, though rejecting the test, the Court appears to rely on that test to conclude that Tandem is a joint employer in this case. [1] So, I must disagree with the Court's reasoning. Under the Texas Workers' Compensation Act, an "employer" is defined as a person who makes a contract of hire and has workers' compensation insurance coverage. [2] Because Tandem hired Alvarado and purchased workers' compensation insurance covering Alvarado, Tandem is an "employer" entitled to receive the benefit of the Texas Workers' Compensation Act's exclusive remedy provision. [3] Because I agree with the Court's judgment, I concur.

1 *See* ___ S.W.3d ___, ___.
2 TEX. LAB. CODE § 401.011(18).
3 *Id.* § 408.001(a).

Rather than rely on a shared right-to-control to determine under the workers' [**48] compensation statute who the employer is, I would follow the approach outlined by *Texas Industrial Contractors, Inc. v. Ammean*. [4] In *Ammean*, Richard J. Ammean was hired by Texas Industrial Contractors, but assigned to work at Bayer Corporation. [5] Ammean was injured at Bayer's facility and later filed and received workers' compensation benefits from Texas Industrial

Contractors' carrier. [6] Ammean maintained that Bayer was his "employer" for workers' compensation purposes because Bayer controlled his work, thus, Texas Industrial Contractors was not immune from his suit for negligence. Not knowing if he was correct in his assessment, Ammean also brought a negligence action against Bayer. In deciding which entity qualified as Ammean's employer, the court stated:

[When] a worker is hired by one company that has contracted to do work for another, that company has a workers' compensation policy, and the worker receives benefits under that policy following an award by the Texas Workers' Compensation Commission, the worker's common law claim against that company is barred by the Act's exclusive remedy provision, even if control over the details of the work is in the hands of the [**49] other company with which that company has contracted. [7]

4 18 S.W.3d 828 (Tex. App.--Beaumont 2000, pet. dism'd by agr.).
5 *Id.* at 831.
6 *Id.*
7 *Id.*

My principal concerns with the Court's position are two-fold. First, it applies the right-to- control test - a test that leads to unfair results - to determine the "employer" for workers' compensation purposes. And second, under these circumstances, it concludes that Alvarado has joint employers - a holding that is neither supported nor predicted by relevant legislative enactments.

Using the right-to-control test is unfair because it leaves employees in Alvarado's circumstance at a loss as to whom they should look for compensation coverage. On the other hand, in these circumstances, though the actual employer procured workers' compensation [**50] for its employee [*151] and the employee actually received benefits from the policy, the employer would not know if it was the "employer" under the compensation act and thus is entitled to the act's exclusivity protection, until a court determines who controls the employee's particular activity. For example, in *Ammean*, were the court to have applied the right-to-control test, then Ammean could have sued Texas Industrial Contractors for negligence even though Ammean collected workers' compensation benefits under a policy paid for by that company.

Furthermore, in concluding that Alvarado has two employers for workers' compensation purposes because they exercise joint control, the Court applies the right-to-control test very broadly. This seems peculiarly inconsistent with the Court's application of this same right-to-control test in *St. Joseph's Hospital v. Wolff*, [8] in which a majority of the Court concluded that the status of "employer" was limited to the entity that was in immediate control of the specific details of the employee's work. The test applied in *Ammean*, I think, produces results more in keeping with Texas's workers' compensation scheme. And it is a more accurate [**51] test for determining who Alvarado's "employer" is for workers' compensation purposes.

8 94 S.W.3d 513, 537, 46 Tex. Sup. Ct. J. 142 (Tex. 2002) (plurality op.).

Texas's workers' compensation scheme was adopted and designed to benefit both the employee and the employer. [9] While it is true, as the Court states, that "nothing in the Act provides that there must be only one 'employer' for workers' compensation purposes," [10] it is not at all clear to me that the Legislature would permit a temporary employee to have two employers under the Act or that the "co-employer" relationship would further the purposes of the Act. [11]

9 *See, e.g.*, *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 206-07, 43 Tex. Sup. Ct. J. 595 (Tex. 2000); *Reed Tool Co. v. Copelin*, 610 S.W.2d 736, 739, 24 Tex. Sup. Ct. J. 96 (Tex. 1980).
10 ___ S.W.3d at ___.
11 *Id.* at ___.

[**52] In relying on "joint" control to conclude that Alvarado had two employers for workers' compensation purposes, the Court looks for guidance by reviewing other parts of the Texas Labor Code, specifically the Staff Leasing Services Act. [12] Section 91.042(c) of that Act states that the staff leasing company and its client company are co-employers for workers' compensation purposes. [13] Interestingly, though, the concept of "co-employers" has not been recognized by the Legislature beyond what it provided in the Staff Leasing Services Act. [14] Particularly, the Legislature has not added the concept to the Workers' Compensation Act. As well, the Legislature's recognition of "co- employer" status in the Staff Services Leasing Act is a specific statutory proviso designed solely for leased employee situations. [15] I note further that the Staff Leasing Act's enactment coincided with the litigation embodied in *Texas Workers' Compensation Insurance Fund v. Del Industrial, Inc.*, which was resolved by us in 2000. And the real issue in that case

was over how to calculate insurance premiums [16] - an issue [*152] specifically addressed in the statute. [17] The Staff Leasing Act is as consistent with the [**53] conclusion that the Legislature did not intend to recognize, generally, that there could be more than one employer for worker's compensation purposes, as it is with the conclusion that the Legislature intends the workers' compensation scheme to recognize dual-employerships.

12 *Id.* at ___; TEX. LAB. CODE §§ 91.001-.063.
13 TEX. LAB. CODE § 91.042(c).
14 *Compare id.* § 91.042(c) *with id.* § 408.001(a). *See also Tex. Workers' Compensation Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 596, 43 Tex. Sup. Ct. J. 589 (Tex. 2000).
15 *Del Indus.*, 35 S.W.3d at 596.
16 *Id.* at 593-95.
17 *See* TEX. LAB. CODE § 91.042(b).

Furthermore, this case is not one of dual employers. Two entities are "co-employers" when they have joint control over an employee's work. Co-employers have been widely recognized in the labor and employment context, as well as in the workers' compensation [**54] context. [18] But these cases reflect situations where the parties either had the intent to conduct business as "co-employers" or situations where the parties expressly contemplate a "co-employer" relationship. [19]

18 *See Garza v. Excel Logistics, Inc.*, 100 S.W.3d 280, 283-88 (Tex. App.--Houston [1st Dist.] 2002, pet. filed); *Ingalls v. Standard Gypsum, L.L.C.*, 70 S.W.3d 252, 258 (Tex. App.--San Antonio 2001, pet. denied); *Brown v. Aztec Rig Equip., Inc.*, 921 S.W.2d 835, 847 (Tex. App.--Houston [14th Dist.] 1996, writ denied); *Gen. Accident Fire & Life Assurance Corp. v. Callaway*, 429 S.W.2d 548, 549-51 (Tex. App.--Houston [1st Dist.] 1968, no writ).
19 *See, e.g.*, *Ingalls*, 70 S.W.3d at 258; *Brown*, 921 S.W.2d at 847.

For example, the facts in *Ingalls v. Standard Gypsum, L.L.C.* demonstrate an actual "co- employer" circumstance. [20] In *Ingalls*, two separate companies joined together to operate [**55] one facility. Accordingly, the employee was working for all parties at the time of his injury. But the relationship between Tandem and Web is entirely different. Tandem's business is providing temporary help. Web's business is manufacturing. Tandem assigned its employees on a temporary basis to work at Web's premises, but no joint undertaking between Tandem and Web ever existed.

20 *Ingalls*, 70 S.W.3d at 256-57.

As another example, in *Brown v. Aztec Rig Equipment, Inc.*, William Brown signed an employment agreement which declared that the staff leasing company, Administaff, Inc., and the client company, Aztec, were his "co-employers." [21] As mentioned above, the Legislature has now expressly addressed the circumstances of *Brown* in the Staff Leasing Services Act, which expressly allows a co- employer relationship. [22] And here, we are dealing with a temporary help provider, not a staff leasing company. [23] As well, Alvarado has no express agreement regarding co-employment.

21 *Brown*, 921 S.W.2d at 838.
[**56]
22 *See* TEX. LAB. CODE § 91.042(c).
23 *Brown*, 921 S.W.2d at 838.

Of course, in situations where the parties expressly contemplate a "co-employer" relationship, there is no reason to disregard such a relationship. [24] But I cannot assume that the Legislature intended for an employee to have two employers under the Texas Workers' Compensation Act when the Legislature has not expressly said so, generally, and has expressly said so only in one narrow business circumstance - staff leasing.

24 *See, e.g.*, *id.* at 847.

Furthermore, workers' compensation statutes in other jurisdictions have not only clearly recognized "co-employers" and provided the exclusivity defense to each, but those jurisdictions, with limited exceptions, require all employers to carry workers' compensation insurance, [25] which is not the case in Texas. For the Court to recognize [*153] "co-employer" [**57] status not only seems inconsistent with the Legislature's intent expressed in the third-party liability section of the Texas Act, [26] but also it may create ramifications significantly affecting Texas's unique workers'

compensation scheme. I would not alter the Legislature's workers' compensation scheme so dramatically. That should be the Legislature's choice. Thus, I would not afford Tandem and Web "co-employer" status for purposes of the exclusivity defense unless the parties expressly contemplated such a relationship. [27]

25 *See, e.g.*, AR. REV. STAT. § 23-1022(A); CAL. LAB. CODE §§ 3601, 3602; OR. REV. STAT. § 656.018(3); R.I. GEN. LAWS § 28-29-2(3)(C); UTAH CODE ANN. §§ 35-1-43, 35-1-60.
26 TEX. LAB. CODE § 417.001.
27 *See Brown*, 921 S.W.2d at 847.

To determine whether one is immune from a negligence suit under Texas's workers' compensation [**58] scheme as an employer, I would reject the right-to-control test and adopt the test suggested in *Ammean*: whether the entity hired the employee and purchased workers' compensation insurance that covered the injured employee. And because I reject the right-to-control test, I necessarily reject the concept of "joint" control embodied in the Court's conclusion that a "co-employer" relationship exists in this case. Further, I do not agree that the Legislature permits such a concept, generally, under the workers' compensation scheme when it has expressly provided for one, but only in a narrow circumstance.

Tandem hired Alvarado and provided workers' compensation insurance that covered Alvarado's injury. Tandem is Alvarado's "employer" as defined by the Act and under the test outlined by *Ammean*. As such, Alvarado's common law claims against Tandem are barred by the Act's exclusivity provision. Accordingly, I concur in the Court's judgment.

Craig T. Enoch

Justice

Citation #3
77 OH St 3d 271

LEXSEE

Caution
As of: Apr 26, 2012

THE STATE EX REL. NEWMAN ET AL., APPELLEES, v. INDUSTRIAL COMMISSION OF OHIO, APPELLANT.

No. 94-1675

SUPREME COURT OF OHIO

77 Ohio St. 3d 271; 1997 Ohio 62; 673 N.E.2d 1301; 1997 Ohio LEXIS 14

September 24, 1996, Submitted
January 15, 1997, Decided

PRIOR HISTORY: [***1] APPEAL from the Court of Appeals for Franklin County, No. 93AP-486.

Relator-appellees, Jeffrey Newman, Hillard E. Foster, Jr., and Kelly Henderson, were employed by temporary employment services. They were all assigned to work for a customer of their employment service where, in the course of their employment, they suffered work-related injuries. Appellees' workers' compensation claims for their injuries were all allowed.

Appellees filed applications for violation of specific safety requirements ("VSSR"), stating on their applications that they were injured while employed by their temporary services: (Newman) Manpower, Inc., (Foster) Victor Temporary, Inc., and (Henderson) Kelly Services, Inc. Appellees also named as their employers the companies where their injuries occurred: (Newman) Wigand Corporation, (Foster) Invacare, Inc., and (Henderson) Forest City Foam Products. Appellees' VSSR claims against the temporary employment services were all denied on the basis that the services had no control over the conditions alleged to be in violation of the commission's specific safety requirements. The Industrial Commission refused to take action or make findings with respect to the claims [***2] against the

customer companies. Appellees' motions for rehearing were all denied.

Appellees filed a joint writ of mandamus seeking to compel the appellant, Industrial Commission, to take jurisdiction over their applications as to the customer companies. The writ also sought an order requiring the appellant to investigate, hear and determine appellees' VSSR claims against the customer companies.

The court of appeals adopted its referee's report and granted the writ of mandamus.

This matter is now before this court upon an appeal as of right.

DISPOSITION: Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, the Industrial Commission of Ohio (Commission), challenged a decision of the Court of Appeals for Franklin County (Ohio), which granted a writ of mandamus ordering the Commission to consider relator-appellees employees' claims in their applications for violation of specific safety requirements (VSSR) arising out of injuries they sustained while working as temporary employees.

OVERVIEW: The temporary employment agencies (agencies) assigned the employees to work for employer-customers (customers), and the employees suffered work-related injuries. The employees received workers' compensation claims for their injuries and thereafter filed applications for VSSR, contending that they were injured while employed by the customers. The Commission denied all the employees' claims on the basis that the agencies had no control over the customers' alleged violations of the Commission's safety requirements. The Commission refused to take action or make findings on the claims against the customers. The employees were granted a writ of mandamus, and the Commission sought review. The court held that a worker injured while working for a customer of a temporary service agency could pursue a VSSR claim against that customer. Where an agency employed one with the understanding that the employee was to be paid only by the agency to work for a customer of the agency and where that customer had the right to control the manner or means of performing the work, such employee was an employee of the customer within the meaning of the Ohio Workmen's Compensation Act.

OUTCOME: The court affirmed the grant of a writ of mandamus ordering the Commission to consider the employees' claims against the customers.

CORE TERMS: customer, temporary, workers' compensation, workplace, premium, majority opinion, contracting, performing, coverage, immunity, entity, safe, subject to claims, writ of mandamus, processing, ordering

LexisNexis(R) Headnotes

Workers' Compensation & SSDI > Compensability > Injuries > Disregard for Safety Orders
Workers' Compensation & SSDI > Compensability > Safety Violations
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity
[HN1]Ohio Const. art. II, § 35 provides for the granting of an additional award over and above the standard workers' compensation benefits where the claimant's injury or death is found to have been caused by the employer's violation of a specific safety requirement of the Industrial Commission. The workers' compensation premium does not cover the additional award. The violation of specific safety requirements (VSSR) is an award paid by the employer directly. Thus, a VSSR award is not a modification of a previous award, but is a new, separate, and distinct award.

Workers' Compensation & SSDI > Compensability > Safety Violations
Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN2]An employee seeking to recover on a violation of specific safety requirements claim must show more than the violation and proximate causation. The employee must also show that his or her employer is the party that violated the

specific safety requirement.

Labor & Employment Law > Employment Relationships > Employment at Will > Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN3]Where an employer employs an employee with the understanding that the employee is to be paid only by the employer and at a certain hourly rate to work for a customer of the employer and where it is understood that that customer is to have the right to control the manner or means of performing the work, such employee in doing that work is an employee of the customer within the meaning of the Ohio Workmen's Compensation Act.

HEADNOTES

Workers' compensation -- Customer companies of temporary service agencies are "employers" subject to claims for violations of specific safety requirements.

SYLLABUS

Customer companies of temporary service agencies are "employers" subject to claims for violations of specific safety requirements.

COUNSEL: Weiner & Suit Co., L.P.A., and Walter Kaufmann, for appellees.

Betty D. Montgomery, Attorney General, and Jetta Mencer, Assistant Attorney General, for appellant.

Stewart Jaffy & Associates Co., L.P.A., Stewart R. Jaffy and Marc J. Jaffy, urging affirmance for amicus curiae, Ohio Academy of Trial Lawyers.

JUDGES: FRANCIS E. SWEENEY, SR., J. MOYER, C.J., DOUGLAS, RESNICK, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur. LUNDBERG STRATTON, J., concurs separately.

OPINION BY: FRANCIS [***3] E. SWEENEY, SR.

OPINION

[*272] [**1302] FRANCIS E. SWEENEY, SR., J. This court must decide whether customer companies of temporary service agencies are "employers" subject to claims for violations of specific safety requirements. For the following reasons, we find that they are employers for purposes of VSSR claims. Accordingly, we affirm the court of appeals' judgment which issued a writ of mandamus ordering the Industrial Commission to consider appellees' VSSR claims.

[HN1]Article II, Section 35 of the Ohio Constitution provides for the granting of an additional award over and above the standard workers' compensation benefits where the claimant's injury or death is found to have been caused by the employer's violation of a specific safety requirement of the commission. The workers' compensation premium does not cover the additional award. The VSSR is an award paid by the employer directly. Thus, a VSSR award is not a modification of a previous award, but is a new, separate, and distinct award. *State ex rel. Curry v. Indus. Comm.* (1979), 58 Ohio St. 2d 268, 269, 12 Ohio Op. 3d 271, 272, 389 N.E.2d 1126, 1128.

[HN2]An employee seeking to recover [***4] on a VSSR claim must show more than the violation and proximate causation. The employee must also show that his or her employer is the party that violated the specific safety requirement. *State ex rel. Lyburn Constr. Co. v. Indus. Comm.* (1985), 18 Ohio St. 3d 277, 279, 18 Ohio B. Rep. 329, 331, 480 N.E.2d 1109, 1111.

Appellees cite *Daniels v. MacGregor Co.* (1965), 2 Ohio St. 2d 89, 31 Ohio Op. 2d 141, 206 N.E.2d 554, in support for their argument that the customer companies may be deemed to be their employers for purposes of VSSR claims. In *Daniels*, an [*273] employee of a temporary agency was injured while working for a customer of that agency. The employee received workers' compensation benefits through a claim filed with the temporary agency. The employee then attempted to bring a tort action against the customer [**1303] for damages. However, this court held that the customer, who had complied with the workers' compensation provisions, could not be sued for damages. In so

holding, this court stated:

[HN3]"Where an employer employs an employee with the understanding that the employee is to be paid only by the employer and at a certain [***5] hourly rate to work for a customer of the employer and where it is understood that that customer is to have the right to control the manner or means of performing the work, such employee in doing that work *is an employee of the customer within the meaning of the Workmen's Compensation Act."* (Emphasis added.) 2 Ohio St. 2d 89, 206 N.E.2d 554, at syllabus; *Campbell v. Cent. Terminal Warehouse* (1978), 56 Ohio St. 2d 173, 10 Ohio Op. 3d 342, 383 N.E.2d 135; see, also, *State ex rel. Zito v. Indus. Comm.* (1980), 64 Ohio St. 2d 53, 18 Ohio Op. 3d 257, 413 N.E.2d 787 (a general contractor who had the "authority to alter or correct" any deficiencies on the construction site could be liable for a VSSR claim brought by employee injured by scaffolding erected by subcontractor); *State ex rel. Lyburn, supra.*

Therefore, the court in *Daniels* found that the entity which controls the manner or means of performing the work is also the "employer" of the employee regardless of whether that entity paid the premium into the State Insurance Fund from which the compensation is paid. While *Daniels* dealt with the Workers' Compensation Act's [***6] exclusivity provision, R.C. 4123.74, we agree with appellees that its rationale should be expanded to allow coverage under the Act for VSSR claims against the customer-employer. To hold otherwise would be grossly unfair, as it would allow employers who fail to comply with the safety requirements immunity from VSSR claims as well as immunity from common-law damages. The commission's policy would permit customers of temporary agencies to avoid the requirements of the VSSR laws by making a contract with a temporary agency which lets the agency "employ" the workers on the employer's worksite. The employer who hires through a temporary agency would have no incentive to provide a safe workplace. Moreover, to adopt the Industrial Commission's position would leave temporary employees with no remedy to address injuries sustained as a result of an alleged violation of a specific safety requirement. Depriving these temporary employees of the additional award provisions of Section 35, Article II would defeat the General Assembly's purpose in enacting VSSR laws. See *State ex rel. Lyburn, supra,* 18 Ohio St. 3d at 280-281, 18 Ohio B. Rep. at 332, 480 N.E.2d at 1112 (Holmes, [***7] J., dissenting).

Based on the above, we conclude that a worker injured while working for a customer of a temporary service agency can pursue a VSSR claim against that [*274] customer company. Accordingly, we affirm the court of appeals' issuance of a writ of mandamus ordering the Industrial Commission to consider appellees' claims.

Judgment affirmed.

MOYER, C.J., DOUGLAS, RESNICK, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

LUNDBERG STRATTON, J., concurs separately.

CONCUR BY: LUNDBERG STRATTON

CONCUR

STRATTON, J., concurring. I concur with the majority opinion. The Industrial Commission contends that to hold the customer companies liable for a VSSR claim is to deprive them of due process because they do not participate in the underlying workers' compensation claim, nor do they have an opportunity to challenge the claim. In other words, the customer companies would be able to "have their cake and eat it too."

Customer companies contract with a temporary employment service to obtain workers; at the same time, these companies contract away their obligations and responsibilities under the workers' compensation laws. The temporary agency becomes [***8] legally responsible for paying workers' compensation premiums for these workers and for processing claims. Thus, when the worker is injured on the job, the temporary agency handles the claim on behalf of the customer company per the contract.

The customer company has assigned its rights and responsibilities with respect to [**1304] workers' compensation to a third party, the temporary agency. The temporary agency acts as its agent in all aspects of workers' compensation coverage. When an accident or injury occurs, the customer company most likely participates to some extent in making a report or conducting an investigation. The temporary agency then represents the interests of the customer company in the processing of the workers' compensation claim. There is no reason to suspect that the temporary agency would not vigorously contest a claim it felt was not justified.

Damages awarded as a result of a VSSR claim are punitive in nature. They are awarded as a result of wrongdoing

to provide a strong incentive for the company to maintain a safe workplace. Ohio has long recognized a policy against contracting away one's responsibility to cover damages caused by intentional torts. [***9] *Gearing v. Nationwide Ins. Co* . (1996), 76 Ohio St. 3d 34, 38, 665 N.E.2d 1115, 1118; *State Farm Mut. Ins. Co. v. Blevins* (1990), 49 Ohio St. 3d 165, 551 N.E.2d 955. The temporary agency cannot be held liable because it did not control the workplace; the customer companies did exercise control over the workplace and should not be able to avoid responsibility for a valid VSSR claim by contracting away all workers' compensation liability. I do not believe the [*275] legislature intended to permit a company which is liable for a specific safety requirement in the workplace to contract away its liability to a temporary agency and thereby escape all responsibility for a violation of a specific safety requirement, leaving the worker without recourse. Therefore, I strongly agree with the majority opinion.

Citation #4

1997 U.S. Dist LEXIS 8842

LEXSEE

Cited
As of: Apr 26, 2012

JOHN PRYCE, JR., Plaintiff v. D. JACKSON & ASSOCIATES, INC., d/b/a UNI-TEMP and UNIVERSAL FOREST PRODUCTS, INC., Defendants

CIVIL ACTION NO. 95-4417

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1997 U.S. Dist. LEXIS 8842

June 23, 1997, Decided
June 24, 1997, FILED; June 25, 1997, ENTERED

DISPOSITION: [*1] Motion GRANTED. Judgment entered in favor of defendant, Universal Forest Products, Inc., and against plaintiff. Action CLOSED.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant employer filed a motion for summary judgment in a claim filed by plaintiff employee. An agency sent the employee to work for the employer. Although the agency paid the workers' compensation and the fine imposed by the Occupational Safety and Health Administration, the employer contended that it was the employer for purposes of the Workers' Compensation Act and that the Act's exclusivity provisions prohibited tort liability.

OVERVIEW: The employee sustained serious and permanent injuries in a workplace accident. The employer filed a motion for summary judgment. The court granted the motion. Because of Pennsylvania's "borrowed servant" doctrine, the employer could not be held legally responsible for any negligence that might have caused the employee's injuries. The employee was functionally and legally an employee because the employer determined and exercised exclusive control over the manner of the employee's performance. The exclusivity provisions of the Pennsylvania Workers' Compensation Act, 77 Pa. Cons. Stat. Ann. § 481(a), shielded the employer from tort liability. Thus, the employer was immune from the employee's strict liability and warranty claims as well as his negligence claims. Moreover, the employer was not subject to strict liability because the employer was not regularly engaged in the business of manufacturing or selling saws or other power equipment. Because control was the determinative factor in assessing an employment relationship, and there was no evidence suggesting that the employer did not exercise the requisite control over the employee's performance, summary judgment was appropriate.

OUTCOME: The court granted the employer's motion for summary judgment and entered judgment in favor of the employer.

CORE TERMS: universal, summary judgment, Compensation Act, strict liability, entity, laborer, Deposition, assigned, workers compensation, employment relationships, selling, genuine, training, right to control, undisputed, contractor, supplying, warranty, servant, compensation payments, tort remedy, legal standards, dual capacity, manufacturing, assembled, disputed, borrowed, hired, temporary, deposition testimony

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Standards > General Overview
[HN1]Summary judgment shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P 56(c). To support denial of summary judgment, an issue of fact in dispute must be both genuine and material, that is, one upon which a reasonable factfinder could base a verdict for the non-moving party and one that is essential to establishing the claim. The court is not permitted, when considering a motion for summary judgment, to weigh the evidence or to make determinations concerning the credibility thereof. The court's sole function, with respect to the facts, is to determine whether there are any disputed issues and, if there are, to determine whether they are both genuine and material. The court's consideration of the facts, however, must be in the light most favorable to the party opposing summary judgment and all reasonable inferences from the facts must be drawn in favor of that party as well.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
[HN2]In order to obtain a summary judgment, the proponent of the motion has the initial burden of identifying, from the sources enumerated in Fed. R. Civ. P. 56, evidence that demonstrates the absence of a genuine issue of material fact. When confronted by a properly supported motion for summary judgment, the opposing party is required to produce, from the same sources, some contrary evidence that could support a favorable verdict. Thus, the mere existence of some evidence in support of the non-moving party will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the non-moving party on the issue. If the movant succeeds in demonstrating that there are no genuine issues of material fact in dispute, or if the parties agree as to the essential facts, the court must then be satisfied that the moving party is entitled to judgment as a matter of law. Obviously, it will avail the proponent of summary judgment nothing if the undisputed facts, considered in light of the substantive legal standards applicable to the claim, do not support a judgment in its favor.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
[HN3]With respect to determining whether a person generally employed by one entity has become the employee of another, the primary factor in such analysis is the right to control the employee's work and his manner of performing it. There are also several other factors that may be considered in determining an injured party's employer, both in the "borrowed" servant context and in general. Such factors include responsibility for payment of wages, the right to hire and fire, the right to select an employee to be loaned, the right to replace one loaned employee with another, and the level of skill or expertise required for the work and possessed by the employee. Nevertheless, the right to control the performance of the work is the overriding factor in determining the employer. Thus, under Pennsylvania law, the entity possessing the right to control the manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised.

Civil Procedure > Summary Judgment > Standards > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees

Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN4]The question of whether an employer-employee relationship exists is one of law, based upon findings of fact. Thus, where there are no disputed issues of fact in the record, the issue of whether an employer is a "statutory employer" for purposes of the Pennsylvania Workmen's Compensation Act is properly the subject of a motion for summary judgment, because whether the facts as they are determined to exist constitute an employment relationship is strictly a question of law.

Labor & Employment Law > Wage & Hour Laws > Child Labor
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > Exceptions
[HN5]77 Pa. Cons. Stat. Ann. § 672(g) permits an illegally employed minor to pursue a tort remedy against an employer if both the minor and the employer have elected not to be bound by the Workers' Compensation Act. In the event of such waiver, however, the minor employee does not receive compensation payments.

Contracts Law > Sales of Goods > Damages & Remedies > Buyer's Damages & Remedies > Limitation & Modification > General Overview
Contracts Law > Sales of Goods > Damages & Remedies > Seller's Damages & Remedies > Limitation & Modification > General Overview
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > Exceptions
[HN6]The exclusive remedy provision of the Workers' Compensation Act, 77 Pa. Cons. Stat. § 481(a), extends to any and all other liability in any action at law or otherwise on account of any injury or death.

Torts > Products Liability > Strict Liability
Workers' Compensation & SSDI > Administrative Proceedings > Settlements
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview
[HN7]Under Pennsylvania law, strict liability extends only to entities which, because they are engaged in the business of selling or supplying a product, may be said to have "undertaken and assumed" a special responsibility toward the consuming public and who are in a position to spread the risk of defective products. Occasional suppliers who are not in the business of selling or supplying such products are not "sellers" subject to strict liability.

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
[HN8]Liability may be imposed upon an employer in accordance with the "dual capacity" theory only when the employee's injury arose from an encounter with the employer or employer's product that was totally extraneous to the employment scheme.

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For UNIVERSAL FOREST PRODUCTS, INC., DEFENDANT: ANTHONY J. PIAZZA, JR., KATHLEEN E. HOLMES, MURPHY, PIAZZA & GENELLO, P.C., SCRANTON, PA USA.

JUDGES: E. Mac Troutman, S.J.

OPINION BY: E. Mac Troutman

OPINION

MEMORANDUM

Plaintiff in this action, John Pryce, sustained serious and permanent injuries in a workplace accident with a power saw. At the age of 17, Pryce was hired by Jackson Associates, d/b/a Uni-temp, which is in the business of providing laborers to various industries. Uni-Temp sent Pryce to work at a wood processing plant operated by defendant Universal

Forest Products, Inc. [1] Although Pryce was a minor and, therefore, prohibited by the federal Fair Labor Standards Act from engaging in certain dangerous work, Universal assigned him to cut wood with a power-driven circular saw that Universal itself had designed and assembled from various component parts for its particular and unique tasks. On December 1, 1993, while operating [*2] the saw, plaintiff's right hand came into contact with the blade, partially severing the thumb and severely damaging the index finger on that hand.

> 1 By order entered on April 25, 1996, (Doc. # 16), D. Jackson & Associates, Inc., was dismissed from this action for lack of subject matter jurisdiction over the claim asserted against that defendant. Universal Forest Products, Inc., therefore, is now the only defendant in this action.

Pryce alleges that because he was a minor and thereby prohibited by law from doing the dangerous work which resulted in his injuries, defendant Universal's conduct in assigning plaintiff to work with a power saw amounts to negligence per se. Plaintiff also alleges that Universal was negligent in designing, manufacturing, assembling and supplying the power saw used at its wood processing facility. In addition, plaintiff has asserted a strict liability claim against Universal, alleging that it designed, manufactured, assembled and supplied to plaintiff, an intended user, an unreasonably [*3] dangerous, defectively designed saw, and failed to adequately warn plaintiff of the dangers inherent in the intended use of the saw. Finally, plaintiff alleges that Universal breached express and implied warranties that the saw was fit for its intended purpose. [2]

> 2 Originally, plaintiff had likewise asserted a claim for punitive damages, but that claim was subsequently dropped from the case.

Defendant Universal has not disputed the essential facts upon which plaintiff's claims are based, *i.e.*, that plaintiff, while still a minor, was injured as a result of operating power equipment at Universal's wood processing plant. Nevertheless, defendant has filed a summary judgment motion, presently pending before the Court, in which it asserts that it cannot be held legally responsible for any negligence which might have caused plaintiff's injuries because of Pennsylvania's "borrowed servant" doctrine. [3] Defendant Universal contends that it was plaintiff's employer for purposes of the Pennsylvania Workers' Compensation [*4] Act, and, therefore, is protected by the Act's bar against imposition of tort liability upon an employer, notwithstanding Uni-temp's assumption of responsibility for actual payment of the workers compensation due to plaintiff for his injuries. Defendant also contends that there is no legally cognizable basis for plaintiff's breach of warranty and strict liability claims, since Universal is not in the business of manufacturing and selling equipment such as the saw here in issue.

> 3 The parties agree that Pennsylvania tort law provides the rule of decision in this diversity action.

Summary Judgment Standard

Although quite familiar, the legal standards governing the Court's consideration of defendant Universal's summary judgment motion bear repeating. Generally, [HN1]summary judgment shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P 56(c).

To support denial of summary judgment, an issue of fact in dispute must be [*5] both genuine and material, *i.e.*, one upon which a reasonable factfinder could base a verdict for the non-moving party and one which is essential to establishing the claim. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Court is not permitted, when considering a motion for summary judgment, to weigh the evidence or to make determinations concerning the credibility thereof. Our sole function, with respect to the facts, is to determine whether there are any disputed issues and, if there are, to determine whether they are both genuine and material. *Id.*

The Court's consideration of the facts, however, must be in the light most favorable to the party opposing summary judgment and all reasonable inferences from the facts must be drawn in favor of that party as well. Tigg Corp. v. Dow Corning Corp, 822 F.2d 358 (3d Cir. 1987).

[HN2]In order to obtain a summary judgment, the proponent of the motion has the initial burden of identifying, from the sources enumerated in Rule 56, evidence which demonstrates the absence of a genuine issue of material fact. When confronted by a properly supported motion for summary judgment, the opposing party [*6] is required to produce, from the same sources, some contrary evidence which could support a favorable verdict. Thus,

> The mere existence of some evidence in support of the non-moving party will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to

reasonably find for the non-moving party on the issue.

Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298, 1308 (3rd Cir. 1995).

If the movant succeeds in demonstrating that there are no genuine issues of material fact in dispute, or if the parties agree as to the essential facts, the Court must then be satisfied that the moving party is entitled to judgment as a matter of law. Obviously, it will avail the proponent of summary judgment nothing if the undisputed facts, considered in light of the substantive legal standards applicable to the claim, do not support a judgment in its favor.

In this case, the parties' disagreement pertains primarily to the legal effect of the facts established through discovery concerning (1) plaintiff's employment relationships with defendant Universal Forest Products and former co-defendant Uni-Temp; (2) an agreement between [*7] Universal and Uni-Temp regarding the payment of plaintiff's workers compensation claim; and (3) the manufacture/assembly and use of the power saw. In the context of instant motion, therefore, the Court is required to determine, as a matter of law, whether plaintiff's claims are viable in light of the undisputed facts relevant to those claims.

Borrowed Servant Doctrine

Since there is no question that plaintiff was injured during the course and scope of his employment and that, pursuant to the Pennsylvania Workers' Compensation Act, liability of the employer under the Act is exclusive of all other claims and actions, 77 Pa. Cons. Stat. Ann. § 481(a), plaintiff will be foreclosed from pursuing this action against Universal if it is determined that Universal was his employer at the time of the accident.

Although it is likewise undisputed that plaintiff was hired and paid by Uni-Temp, defendant Universal argues that under Pennsylvania law, Universal was plaintiff's employer for purposes of applying the exclusive remedy provision of the Workers' Compensation statute in that plaintiff's deposition testimony, as well as the testimony of other witnesses, clearly establish that Universal [*8] had the exclusive right to control plaintiff's performance of the work that he was assigned.

The legal standards for determining Universal's employer status are derived primarily from decisions of the Pennsylvania courts resolving disputes over the responsibility for workers' compensation payments to injured employees. In the context of this action, we look to the standards developed for establishing the true employer of a "borrowed" employee, *i.e.*, "an employee...furnished by one entity to another." *Accountemps v. W.C.A.B. (Myers)*, 120 Pa. Commw. 489, 548 A.2d 703, 705 (Pa. Cmmwlth. 1988). In *Accountemps*, which likewise involved an agency in the business of supplying temporary employees to clients, the court reiterated and applied the method previously set forth by the Pennsylvania Supreme Court [HN3]with respect to determining whether a person generally employed by one entity has become the employee of another. The primary factor in such analysis is "the right to control the employee's work [and] his manner of performing it." *Id.*

As plaintiff argues, there are also several other factors which may be considered in determining an injured party's employer, both in the "borrowed" servant [*9] context and in general. Such factors include responsibility for payment of wages, the right to hire and fire, the right to select an employee to be loaned, the right to replace one loaned employee with another, and the level of skill or expertise required for the work and possessed by the employee. *Id.*; *JFC Temps, Inc. v. W.C.A.B. (Lindsay)*, 680 A.2d 862 (Pa. 1996).

Nevertheless, "the right to control the performance of the work is the overriding factor" in determining the employer. *JFC Temps* at 865. *See, also*, *Wetzel v. City of Altoona*, 152 Pa. Commw. 309, 618 A.2d 1219 (Pa. Cmmwlth. 1992); *Wilkinson v. K-Mart*, 412 Pa. Super. 434, 603 A.2d 659 (1992); *Rolick v. Collins Pine Co.*, 925 F.2d 661 3rd Cir. 1991). Thus, under Pennsylvania law, as clearly and succinctly stated in *JFC Temps*, "The entity possessing the right to control the manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised." 680 A.2d at 862.

Consequently, to decide whether Universal was, as it argues, plaintiff's employer at the time of the accident, we must examine the record for indicia of control over the manner of plaintiff's performance [*10] of his work at Universal.

Although plaintiff testified that he was given virtually no training or direction by Universal employees concerning how to use the saw, there is no evidence that he was previously familiar with, or had ever before operated, that type of equipment. There is likewise no evidence that Uni-Temp had specific knowledge of the work he would be assigned at

Universal, or provided him with instruction, training or supervision concerning any type work that he might be expected to perform when sent to a Uni-Temp client's facility. Plaintiff testified that he was told by a Uni-Temp employee only that he was to report to Universal for the second shift to stack wood. (Deposition Testimony of John Pryce at 58). When he arrived at Universal for the first time, plaintiff reported to a Universal supervisor, Kevin Dexter, who sent him to a worksite where another laborer was operating a saw. (*Id.* at 13, 65). Pryce testified that he was supposed to stack the wood, but the other laborer told him to feed the wood into the saw and showed him how to do it. (*Id.* at 65). The next day, Pryce again reported to Dexter, who took him to a different saw and showed him how to stack [*11] wood. (*Id.*) When Pryce next reported to Dexter an hour later, Dexter put him to work on the saw on which plaintiff was injured several weeks later. (*Id.* at 66). In general, plaintiff testified that Dexter, a Universal employee, was his boss, *i.e.*, the person who told him what to do and how to do it while Pryce worked at Universal. (*Id.* at 82, 83). Although plaintiff may have been given very little training, instruction or supervision by Universal employees, he was given none whatsoever by Uni-temp, and plaintiff himself was not independently knowledgeable or skilled in the performance of the tasks he was assigned by Universal. In general, it is clear from plaintiff's testimony that a Universal supervisor not only decided which tasks plaintiff was to perform but also instructed him, however minimally, in the means and methods developed and preferred by Universal to accomplish those tasks.

Kevin Dexter, the Universal supervisor identified by Pryce as his boss, confirmed that he showed plaintiff how to run the saw and instructed him in the way to perform all of the component tasks of the job plaintiff was assigned to do. (Deposition Testimony of Kevin Dexter at 26, 29). [*12] [4]

> 4 Dexter testified that he provided far more extensive training and supervision to plaintiff between the date of hiring and the date of the accident than Pryce described. For purposes of the present discussion concerning control over the means and methods of plaintiff's performance, however, the discrepancies in the testimony concerning the extent of plaintiff's training and supervision do not create disputes of fact that are either genuine or material.

The deposition testimony of Thomas Staskel, current General Manager and former Plant Manager at the Universal facility involved in this action, is also instructive on the issue of control. In response to questions concerning training of new employees, Staskel testified that Kevin Dexter would have been responsible for showing a new second-shift employee what to do or for assigning such employee to work with someone more experienced. (Deposition of Thomas Staskel at 31). Staskel further testified that it was Universal's policy to train all new employees and [*13] that Pryce was under the direction of Universal while working at its premises. (*Id.* at 33, 83.)

From the foregoing testimony, we conclude that plaintiff was a general laborer, without any special knowledge or expertise, who was hired by the Uni-temp agency and sent to Universal. There he was instructed to perform assigned tasks in accordance with Universal's standard procedures and to follow its established policies. Since Universal determined and exercised exclusive control over the manner of plaintiff's performance, Pryce was functionally and legally a Universal employee. We further conclude, therefore, that as plaintiff's employer, Universal is shielded from liability for plaintiff's tort claims pursuant to the exclusive remedy provision of the Pennsylvania Workers' Compensation Act.

Plaintiff has, however, asserted a number of reasons for denying summary judgment which are based upon factors other than his working relationship with Universal. In the first instance, plaintiff contends that the determination of employer/employee status is a fact-based inquiry. Although this is an accurate statement, as far as it goes, it does not foreclose summary judgment. As noted by the [*14] court in *JFC Temps*, [HN4]"The question of whether an employer-employee relationship exists is one of law, based upon findings of fact." 680 A.2d at 864. Thus, where there are no disputed issues of fact in the record,

> The issue of whether an employer is a "statutory employer" for purposes of the Workmen's Compensation Act is properly the subject of a motion for summary judgment, as "whether the facts as they are determined to exist constitute an employment relationship is strictly a question of law." *Keller v. Old Lycoming Twp.*, 286 Pa. Super. 339, 345, 428 A.2d 1358, 1361 (1981).

Wilkinson v. K-Mart, 412 Pa. Super. 434, 603 A.2d 659, 660--661 (Pa. Super. 1992).

Based upon the record before the Court, we have here concluded that there are no disputed issues of fact concerning the nature and extent of Universal's control over plaintiff's performance of the work assigned to him by Universal. Since

control is clearly the determinative factor in assessing an employment relationship, and there is no evidence suggesting that Universal did not exercise the requisite control over plaintiff's performance, there is no reason to submit to a jury the issue of whether there was an employer/employee [*15] relationship between Pryce and Universal. On the record before the Court, therefore, there is no impediment to granting defendant's summary judgment motion based upon the Court's determination that Pryce was a Universal employee.

Similarly, we reject plaintiff's contention that other factors, such as hiring, right to terminate employment and payment of wages and compensation, should be considered in determining plaintiff's status as an employee of Universal. We conclude, based on the record, that Universal's right to control plaintiff's performance is so clear that additional factors, which might be relevant to establishing an employment relationship in a more questionable situation, cannot overcome our legal conclusion that an employment relationship existed between Pryce and Universal at the time of the accident. It would be inappropriate, therefore, in light of the substantive legal standards applicable to determining an employment relationship, to permit a jury to consider whether other factors identified by plaintiff as contrary to such a finding outweigh the evidence of control over the manner of plaintiff's performance of the tasks assigned to him by Universal. As noted, control [*16] over the manner of an employee's performance is the overriding factor under Pennsylvania law. Thus, once control has been established, that factor may not be outweighed by other evidence to negate the conclusion that an employment relationship existed between Pryce and Universal.

Plaintiff next argues that Universal is estopped from claiming to be his employer in that it refused to pay his workers' compensation claim and did not pay the fine imposed by the United States Department of Labor, Occupational Safety and Health Administration, (OSHA) for employing a minor in violation of the Fair Labor Standards Act. Plaintiff contends that, having argued vigorously that it was not plaintiff's employer for those purposes, Universal may not now claim employer status in order to avoid tort liability.

Although this argument has a facial appeal, we are ultimately unpersuaded by it. The record establishes that the payment of workers' compensation by Uni-Temp for the injuries sustained by Pryce was a matter of agreement between Universal and Uni-Temp, based upon negotiated conditions under which Universal would use Uni-Temp to supply it with laborers from time to time. (*See*, Staskel Deposition [*17] at 11-12, 24). In return for a flat fee paid by Universal, Uni-Temp "paid the employee directly, and they took care of all other such employee costs." (*Id.* at 12). There is no evidence of any adjudication by a Pennsylvania administrative agency or court that Uni-Temp was responsible for payment of plaintiff's compensation as his true employer and/or that Universal was not responsible for payment of his compensation. It appears, rather, that after plaintiff applied for workers' compensation, Uni-Temp agreed to abide by its longstanding agreement with Universal and assume responsibility for paying the compensation.

In addition, there is no dispute that Uni-Temp agreed to be responsible for payment of the fine resulting from the OSHA violation because it admittedly violated its agreement with Universal to provide Universal with adult employees only, in accordance with the Universal policy against hiring minors. (*See*, Deposition of James Overbeek at 11, 47; Deposition of Kelly Lindenmuth 33, 43--50; Deposition of Thomas Staskel at 11, 22, 25). It was Universal, however, not Uni-Temp, that was actually cited for the violation of federal law arising out of Pryce's employment.

[*18] Plaintiff also contends that because he was a minor and Universal did not pay his workers' compensation, he falls within the exception to the exclusivity provision of the Workers' Compensation Act found in 77 Pa. Cons. Stat. Ann. § 672(g). [HN5]This section of the Act permits an illegally employed minor to pursue a tort remedy against an employer if both the minor and the employer have elected not to be bound by the Workers' Compensation Act. In the event of such waiver, however, the minor employee does not receive compensation payments.

In light of the record in this case, we cannot agree that either party elected not to be bound by the Workers' Compensation Act. As noted, the actual payment of compensation by Uni-Temp rather than by Universal was a matter of agreement between Universal and Uni-Temp in which plaintiff in this action did not participate. Moreover, plaintiff did receive workers' compensation payments, and the record clearly establishes that until plaintiff was injured, Universal was unaware that it was employing a minor sent to it by Uni-Temp in contravention of Universal's policy against employing minors. Consequently, there is absolutely no evidence that, prior to the [*19] commencement of the instant action, either party intended, or expected, that § 672(g) would be applicable.

Plaintiff's argument regarding the applicability of § 672, however, is a bit more complex than the simple assertion that Pryce waived his right to compensation payments, since he clearly did not do so. Rather, plaintiff contends that under §§ 461 and 462 of the Workers' Compensation Act, Uni-Temp was a sub-contractor hired by Universal, a contractor, to perform work that is a recurrent part of Universal's business and that Uni-Temp was primarily liable for, and secured, the payment of Pryce's compensation. Thus, according to plaintiff's argument, Universal, as a contractor, is

subject to tort liability for its negligence in causing injury to Pryce, the employee of the sub-contractor, Uni-Temp. Apparently, plaintiff is attempting to assert that Universal may be characterized as a contractor and Uni-Temp as subcontractor based upon the manner in which plaintiff was supplied to Universal as a laborer, as well as the fact that Uni-Temp actually paid his compensation. Plaintiff further argues that terming Universal a contractor and Uni-Temp a subcontractor somehow establishes a [*20] minor's waiver of compensation within the meaning § 672(g).

It is not necessary, however, to determine plaintiff's precise reasoning in this regard in order to reject the waiver argument under § 672(g), and/or any other application of §§ 461 and 462 to this action. As already noted and discussed, Uni-Temp's function vis a vis Universal was to supply general laborers for whatever specific tasks Universal chose to assign to such temporary help. Uni-temp neither trained, nor organized, nor supervised the laborers it procured for Universal in order for them to perform, under the direction of Uni-Temp, any part of the work that was part of Universal's business. Under the undisputed facts concerning the relationship between Universal and Uni-Temp, we conclude that these entities cannot be considered contractor and subcontractor within the meaning of §§ 461 and 462 of the Workers' Compensation Act. Consequently, the fact that Uni-Temp secured the payment of plaintiff's compensation as a result of its agreement with Universal does not permit plaintiff to pursue a tort action against Universal.

In general, plaintiff's arguments in support of his contention that he should be permitted to [*21] seek a tort remedy for his injuries in addition to compensation focus on legal constructs and strained interpretations of the Workers' Compensation statute that distort the reality of the situation, *i.e.*, that functionally, there was a master/servant relationship between Universal and himself. Plaintiff focuses on which entity, Universal or Uni-Temp, actually paid his compensation, not on which entity would likely have been responsible for the payments absent an agreement between Universal and Uni-Temp that did not involve or concern plaintiff in any way.

The question truly at the heart of the issues in this case is whether compensation is the appropriate and exclusive remedy for plaintiff's injury. Which entity paid the compensation is a technicality which plaintiff seeks to invest with great significance, but which is actually irrelevant. The statutory scheme that Pennsylvania has developed to provide a certain but exclusive remedy for injuries to employees should not be lightly disregarded in order to provide additional remedies in an arguably sympathetic case, particularly where the reality of the circumstances must likewise be disregarded and the Court must focus exclusively [*22] on strained constructions of specific provisions of the Pennsylvania Workers' Compensation Act.

As noted, under the universal interpretation of the Workers' Compensation Act adopted by Pennsylvania courts, the existence of an employment relationship is determined by the answer to one question, *i.e.*, which entity that might arguably be considered an injured worker's employer exercised control over the worker prior to the injury? In the usual context, the answer determines which entity is responsible for payment of compensation. In the context of this case, however, the answer to the essential question determines whether compensation remains the plaintiff's sole remedy for the injury suffered within the course and scope of his employment, or whether he is permitted to pursue a tort remedy. If Universal had not exercised the requisite control over plaintiff's performance, it could then have been considered a third party against whom the injured worker could seek a recovery for negligence and other tort claims.

Under the circumstances of this case, however, we cannot, as plaintiff suggests, disregard the fundamental concept of control simply because the two businesses involved in [*23] this action reached an agreement concerning the payment of compensation in the event of injury to a laborer supplied by one to the other. The terms and conditions which govern the business relationship between Universal and Uni-Temp have nothing to do with either the circumstances of plaintiff's employment or the circumstances which led to his injury, and, therefore, cannot be a decisive factor in determining whether plaintiff is limited to workers' compensation as the remedy for his injuries.

For all of the reasons stated herein, we reject plaintiff's arguments that he is entitled to pursue a tort remedy against Universal. We will, therefore, grant defendant's motion for summary judgment.

Strict Liability

Since we have concluded that plaintiff cannot pursue tort claims against Universal because of the existence of an employer/employee relationship between Universal and plaintiff, Universal is immune from plaintiff's strict liability and warranty claims as well his negligence claims. [HN6]The exclusive remedy provision of the Workers' Compensation Act, § 481(a), extends to "any and all other liability...in any action at law or otherwise on account of any injury or death." Consequently, [*24] unless there is some reason, other than those already raised by plaintiff and rejected by the Court, that plaintiff's strict liability and warranty claims are not covered by this statutory section, our granting of defendant's summary judgment motion will likewise extinguish those claims.

Plaintiff appears to argue, however, that his strict liability claim remains viable in that strict liability is imposed upon all manufacturers, sellers, assemblers and others in the chain of distribution of a defective product, regardless of the relationship between plaintiff and a strictly liable defendant.

Leaving aside the question of the impact of the Workers' Compensation Act upon the law of strict liability, defendant Universal contends that, under any circumstances, strict liability may be imposed only where the defendant is in the business of manufacturing, selling, assembling or otherwise distributing the allegedly defective product. In this case, defendant Universal characterizes itself as, at most, an "occasional seller" of equipment it assembles and/or modifies for its own unique purposes.

This characterization is completely supported by the evidence adduced in support of Universal's [*25] motion for summary judgment. Wayne Knoth, Universal's senior vice-president of engineering, testified that defendant sells only worn-out or obsolete equipment, whether such equipment had been purchased or was designed and assembled by Universal. (Deposition of Wayne Knoth at 40, 63). Such testimony was confirmed by James Overbeek, Universal's vice-president of corporate services, and by Thomas Staskel, general manager of operations. (Overbeek Deposition at 61; Staskel Deposition at 83).

In addition to our conclusion that all tort claims in this action are barred by the Workers' Compensation Act, we agree with defendant that [HN7]under Pennsylvania law, strict liability, as described and defined in the RESTATEMENT (SECOND) OF TORTS, § 402A, extends only to entities which,

> Because they are engaged in the business of selling or supplying a product may be said to have "undertaken and assumed" a special responsibility toward the consuming public and who are in a position to spread the risk of defective products...*Occasional suppliers who are not in the business of selling or supplying such products are not "sellers" subject to strict liability.*

Berkebile v. Brantly [*26] *Helicopter Corporation*, 462 Pa. 83, 337 A.2d 893, 898, n. 3 (Pa. 1975)(Emphasis added). There can be no dispute, in light of the record in this case, that Universal is not regularly engaged in the business of manufacturing, selling or otherwise supplying saws or other power equipment. Rather, defendant sometimes disposes of unusable or unwanted equipment by selling it rather than by disassembling or simply discarding it. Subjecting Universal to strict liability under such circumstances would be an unwarranted extension of Pennsylvania law under any circumstances, and would be particularly contrary to the law of Pennsylvania in the context of permitting an injured worker to circumvent the exclusivity provision of the Workers' Compensation Act. [5]

> 5 The only other possibility for permitting plaintiff's action to proceed against Universal based upon either a strict liability or negligence theory, notwithstanding the exclusivity provision of Pennsylvania's Workers' Compensation Act, is the "dual capacity" theory of liability. Although neither party to this action raised this possibility, the Court has *sua sponte* considered and rejected the applicability of the "dual capacity" theory of liability in this case.
>
> The "dual capacity" theory was identified by the Pennsylvania Supreme Court in *Tatrai v. Presbyterian University Hospital*, 497 Pa. 247, 439 A.2d 1162 (Pa. 1982). As noted in *Weldon v. Celotex Corp.*, 695 F.2d 67, 71 (3rd Cir. 1982), [HN8]liability may be imposed upon an employer in accordance with the dual capacity theory only when the employee's injury arose from an encounter with the employer or employer's product that was "totally extraneous to the employment scheme." *Quoting*, *Tatrai*, 439 A.2d at 1165. In this case, plaintiff's injury arose directly out of use of the power saw while in the course and scope of his employment. Pryce would not have sustained injury arising from use of the saw assembled by Universal if he had not been told to operate it as part of his duties for Universal.
>
> A different situation would have been presented, and a potentially different outcome might have resulted, at least in the context of negligence and/or warranty theories, if Pryce had purchased a piece of obsolete equipment offered for sale by Universal and was later injured while using such equipment for his own purposes.

[*27] *Conclusion*

Based upon our consideration of the uncontradicted evidence in this action, and our application of the law of Pennsylvania to the undisputed facts established by the evidence, we will grant defendant Universal's pending motion for summary judgment and enter judgment in favor of the defendant. An appropriate order follows.

ORDER

AND NOW, this 23rd day of June, 1997, upon consideration of the Motion of Defendant, Universal Forest Products, Inc., for summary Judgment, (Doc. # 20), and plaintiff's response thereto, **IT IS HEREBY ORDERED** that the motion is **GRANTED**.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant, Universal Forest Products, Inc., and against the plaintiff.

IT IS FURTHER ORDERED that this action having been dismissed as to co-defendant, D. Jackson & Associates, Inc., d/b/a Uni-Temp, by order entered on April 25, 1996, the Clerk is directed to mark this action CLOSED for statistical purposes.

E. Mac Troutman

S.J.

Citation #5
358 S.W. 3d 238

LEXSEE

Analysis
As of: Apr 26, 2012

PORT ELEVATOR-BROWNSVILLE, L.L.C., PETITIONER, v. ROGELIO CASADOS AND RAFAELA CASADOS, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF THEIR SON RAFAEL CASADOS, RESPONDENTS

NO. 10-0523

SUPREME COURT OF TEXAS

358 S.W.3d 238; 2012 Tex. LEXIS 115; 55 Tex. Sup. J. 289

October 6, 2011, Argued
January 27, 2012, Opinion Delivered

SUBSEQUENT HISTORY: Released for Publication March 9, 2012.

PRIOR HISTORY: [**1]
ON PETITION FOR REVIEW FROM THECOURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS.
Port Elevator-Brownsville, L.L.C. v. Casados, 314 S.W.3d 529, 2010 Tex. App. LEXIS 3950 (Tex. App. Corpus Christi, 2010)

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner grain company sought review of an order from the Court of Appeals for the Thirteenth District of Texas, which upheld an award of damages to respondent parents in a negligence action.

OVERVIEW: The employee worked for a temporary staffing agency. The agency provided the employee to perform general labor for the grain company. The employee suffered a fatal, work-related injury while working for the grain company. Both the staffing agency and the grain company carried workers' compensation insurance. The employee's

parents brought an action against the grain company for negligence, negligence per se, and gross negligence. A jury found the grain company negligent, but not grossly negligent. The trial court awarded judgment to the parents. The court of appeals upheld the judgment. On review, the court found that because the jury found that the grain company was not grossly negligent, the parents' action was barred by Tex. Lab. Code Ann. § 408.001(a). Because the grain company was the employee's employer, it was a workers' compensation subscriber, and the employee's injury was work-related, the grain company conclusively proved its exclusive-remedy defense.

OUTCOME: The court reversed the judgment of the court of appeals and rendered judgment for the grain company.

CORE TERMS: elevator, workers' compensation, coverage, workforce, temporary, split, premium, staff, exclusive-remedy, exclusive remedy, work-related, common-law, subscribe, staffing, carrier, classification, insurer, notice, insurance coverage, negligence claims, subscriber, splitting, elect, grossly negligent, render judgment, denied coverage--, subscribed, exclusive remedy, denial of coverage, gross negligence

LexisNexis(R) Headnotes

Workers' Compensation & SSDI > Coverage > General Overview
[HN1]The Texas Labor Code and the rule against split workforces require employers to elect workers' compensation coverage for all employees.

Workers' Compensation & SSDI > Coverage > General Overview
Workers' Compensation & SSDI > Defenses > General Overview
[HN2]The Texas Workers' Compensation Act (TWCA) allows private Texas employers to choose whether to subscribe to workers' compensation insurance. Tex. Lab. Code Ann. § 406.002(a). Employees of subscribing employers also have a choice: they may opt out of the system within the prescribed time and retain their common-law rights. Tex. Lab. Code Ann. § 406.034. The TWCA encourages employers to subscribe by abolishing their common-law defenses of contributory negligence, assumption of the risk, and fellow servant if they do not subscribe. Tex. Lab. Code Ann. § 406.033.

Workers' Compensation & SSDI > Compensability > Course of Employment > General Overview
Workers' Compensation & SSDI > Coverage > General Overview
[HN3]The Texas Workers' Compensation Act (TWCA) allows employees to recover workers' compensation benefits for injuries in the course and scope of employment without proving fault by the employer and without regard to their negligence or that of their coworkers. Tex. Lab. Code Ann. § 406.031. Courts construe the TWCA liberally in favor of coverage as a means of affording employees the protections the legislature created.

Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > Exceptions
[HN4]Employers' liability to employees is limited under the Texas Workers' Compensation Act (TWCA). The TWCA states that recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer for the death of or a work-related injury sustained by the employee. Tex. Lab. Code Ann. § 408.001(a). The only exception to the exclusive remedy provision is when an employee's death is caused by an intentional act or omission of the employer or by the employer's gross negligence. Tex. Lab. Code Ann. § 408.001(b).

Workers' Compensation & SSDI > Coverage > General Overview
[HN5]Although the Texas Workers' Compensation Act (TWCA) specifies that an employer may subscribe to workers' compensation insurance by generally obtaining or declining coverage, Tex. Lab. Code Ann. §§ 406.002 - 406.003, importantly, an employer may not split its workforce by electing coverage for some employees but not coverage for all.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview
[HN6]An employee may have more than one employer within the meaning of the Texas Workers' Compensation Act (TWCA), and each employer who subscribes to workers' compensation insurance may raise the exclusive-remedy provision as a bar to claims about the injury.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
[HN7]An employee of a temporary staffing agency sent to a client company that directs the details of his work is an employee of both companies. An employee should not be placed in the position of trying to determine, perhaps at his or her peril, which of two entities is his or her employer on any given day or at any given moment during a day.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > Employees & Employers
[HN8]A client company can avail itself of the exclusive remedy provision against claims by a temporary employee if either: (1) the client company was a named insured on the staffing company's policy; (2) the staffing company obtained a separate workers' compensation policy for the client company; or (3) the client company obtained its own workers' compensation policy.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Employees
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > Employees & Employers
[HN9]The exclusive-remedy provision of the Texas Workers' Compensation Act (TWCA) bars claims by a temporary worker against a client company if the client company establishes: (1) that it was the temporary worker's employer within the meaning of the TWCA, and (2) it subscribed to workers' compensation insurance.

Workers' Compensation & SSDI > Coverage > General Overview
Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > General Overview
[HN10]A client company is entitled to the exclusive remedy defense upon showing that it was a plaintiff's employer and that it was covered by a workers' compensation policy. This is because the Texas Workers' Compensation Act (TWCA) is intended to prevent an employer from splitting its workforce by choosing coverage for some employees but not coverage for all, absent limited statutory or common-law exceptions. Tex. Lab. Code Ann. §§ 401.011(18), 401.012(a), 406.002 - 406.003, 406.031(a).

Workers' Compensation & SSDI > Coverage > General Overview
[HN11]An employer may not choose to exclude certain employees from workers' compensation coverage unless a statutory or common-law exception to the rule against split workforces applies. A key purpose of the rule against split workforces is that employees know whether they have the protections of workers' compensation coverage. Allowing employers to select which employees to cover would not only violate the long-standing rule against split workforces but would also be in tension with the decision to liberally construe the Texas Workers' Compensation Act (TWCA) to find coverage for employees.

Insurance Law > Claims & Contracts > Premiums > General Overview
Workers' Compensation & SSDI > Coverage > General Overview
[HN12]Premiums are an issue between an employer and its insurer; they do not affect an employee's workers' compensation coverage.

COUNSEL: For Port Elevator-Brownsville, LLC, Petitioners: Mr. P. M. Schenkkan, Ms. Mary A. Keeney, Graves Dougherty Hearon & Moody, P.C., Austin, TX; Mr. Thomas F. Nye, Gault, Nye & Quintana, L.L.P., Corpus Christi, TX; Mr. Mike Mills, Ms. Adriana Hernandez Cardenas, Atlas & Hall, L.L.P., McAllen, TX.

For Rogelio Casados, Respondents: Mr. Michael A. Caddell, Ms. Cynthia Bodendieck Chapman, Mr. Craig C. Marchiando, Ms. Dana B. Levy, Caddell & Chapman, Houston, TX; Mr. Richard D. Daly, Richard Daly Law Firm, Houston, TX; Mr. Frank Costilla, Law Offices of Frank Costilla, L.P., Brownsville, TX; Mr. David E. Keltner, Kelly Hart & Hallman LLP, Fort Worth, TX.

JUDGES: JUSTICE GUZMAN delivered the opinion of the Court.

OPINION BY: Eva M. Guzman

OPINION

[*239] Rafael Casados suffered a fatal, work-related injury while working for two employers that both had workers' compensation coverage. Casados's parents sued one of the employers. The principal issue in this case is whether workers' compensation was the exclusive remedy to Casados's parents, which would bar their suit against Port Elevator. The court of appeals held that the policy at issue did not cover [**2] Casados because he was a temporary worker and affirmed the judgment Casados's parents obtained against Port Elevator. 314 S.W.3d 529, 540. We have long held that [HN1]the Labor Code and the rule against split workforces require employers to elect workers' compensation coverage for all employees--except for limited statutory and common-law exceptions that do not apply here. Because Port Elevator had a workers' compensation policy, Casados was an employee, he suffered a work-related injury, and the jury failed to find Port Elevator grossly negligent, the Texas Workers' Compensation Act (TWCA) provides that the exclusive remedy is against the employer's insurer--not the employer. Accordingly, the claim at issue in this appeal is barred, we reverse the judgment of the court of appeals, and render judgment for Port Elevator.

[*240] **I**.

Rafael Casados worked for Staff Force, Inc. (Staff Force), a temporary staffing agency. Staff Force provided Casados to perform general labor for Port Elevator-Brownsville, LLC (Port Elevator) at its grain storage facility in April 2005. Casados suffered a fatal, work-related injury his third day on the job. Staff Force and Port Elevator both carried workers' compensation [**3] insurance. Staff Force's carrier was Dallas Fire Insurance Company (Dallas Fire) and Port Elevator's carrier was Texas Mutual Insurance Company (Texas Mutual). The TWCA requires workers' compensation insurers to reimburse burial expenses for employees such as Casados who had no spouse, children, or dependents, and to pay a certain sum into the subsequent injury fund. Tex. Lab. Code §§ 403.007, 408.186.[1] Dallas Fire offered to reimburse Casados's parents up to the statutory amount for burial expenses and also paid the required $56,238 into the subsequent injury fund. Port Elevator reported the injury to Texas Mutual, but Texas Mutual denied coverage--claiming that Casados was a Staff Force employee and not a Port Elevator employee. There is no evidence that Casados's parents sought benefits from Texas Mutual or appealed Texas Mutual's denial of coverage. Rather, Casados's parents sued Port Elevator for negligence, negligence *per se*, and gross negligence.

1 In 2007, the Legislature amended the TWCA to also provide 104 weeks of death benefit payments to non-dependent parents in this situation. Tex. Lab. Code § 408.182(d-1).

Port Elevator's workers' compensation policy with Texas Mutual covered [**4] all of Port Elevator's places of employment. The policy requires Texas Mutual to "pay promptly when due the benefits required . . . by workers compensation law." The policy also estimates the premiums due by classifying employees and assessing the risk for each classification. The policy has classification codes for "clerical office employees" and "grain elevator operation & local managers, drivers." The policy has no exclusion for temporary workers such as Casados.

Port Elevator raised the affirmative defense that workers' compensation was the plaintiffs' exclusive remedy. Both sides moved for summary judgment on the exclusive-remedy defense. Port Elevator argued it was a workers' compensation subscriber, Casados was covered, and workers' compensation was the exclusive remedy. Casados's parents argued the policy did not cover Casados because: (1) Port Elevator did not pay premiums for temporary employees; (2) Casados was not covered by any code classification; and (3) Texas Mutual denied coverage. The trial court granted the plaintiffs' motion for summary judgment and denied Port Elevator's--allowing a trial on the negligence and gross negligence claims.

The jury found Port Elevator [**5] negligent but not grossly negligent. After factoring in a settlement credit, the trial court entered judgment on the jury's award on the negligence claim. The court awarded $515,167.09 to Casados's estate for pain, mental anguish, and pre-judgment interest and $2,189,967.76 to Casados's parents for mental anguish,

loss of companionship and society, and pre-judgment interest. The court of appeals affirmed. 314 S.W.3d at 540.

Because we conclude that Port Elevator conclusively established it subscribed to workers' compensation insurance, that Casados was an employee, and that he suffered a work-related injury, we reverse the court of appeals' judgment and render judgment in favor of Port Elevator.

[*241] **II**.

Unlike workers' compensation laws in every other state, [HN2]the TWCA allows private Texas employers to choose whether to subscribe to workers' compensation insurance. Tex. Lab. Code § 406.002(a); *Lawrence v. CBD Servs., Inc.*, 44 S.W.3d 544, 552 (Tex. 2001). Employees of subscribing employers also have a choice: they may opt out of the system within the prescribed time and retain their common-law rights. Tex. Lab. Code § 406.034; *Lawrence*, 44 S.W.3d at 552. Although the TWCA is unique among the [**6] states in allowing private employers to choose whether to subscribe, it encourages employers to subscribe by abolishing their common-law defenses of contributory negligence, assumption of the risk, and fellow servant if they do not subscribe. Tex. Lab. Code § 406.033; *Lawrence*, 44 S.W.3d at 552.

The Legislature intended the TWCA to benefit both employees and employers. For employees, [HN3]the TWCA allows them to recover workers' compensation benefits for injuries in the course and scope of employment without proving fault by the employer and without regard to their negligence or that of their coworkers. Tex. Lab. Code § 406.031; *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 350 (Tex. 2009); *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 511 (Tex. 1995). We construe the TWCA liberally in favor of coverage as a means of affording employees the protections the Legislature created. *Navarette v. Temple Indep. Sch. Dist.*, 706 S.W.2d 308, 309-10 (Tex. 1986). For [HN4]employers, their liability to employees is limited. *Garcia*, 893 S.W.2d at 510-11. The TWCA states that "[r]ecovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage [**7] or a legal beneficiary against the employer . . . for the death of or a work-related injury sustained by the employee." Tex. Lab. Code § 408.001(a). The only exception to the exclusive remedy provision is when an employee's death "was caused by an intentional act or omission of the employer or by the employer's gross negligence." Tex. Lab. Code § 408.001(b). Here the jury found that Port Elevator was not grossly negligent. Accordingly, the suit against Port Elevator is barred by section 408.001(a). *Western Steel Co. v. Altenburg*, 206 S.W.3d 121, 123-24 (Tex. 2006).

[HN5]Although the TWCA specifies an employer may subscribe to workers' compensation insurance by generally obtaining or declining coverage,[2] importantly, the employer may not split its workforce by electing coverage for some employees but not coverage for all. *Tex. Workers' Comp. Ins. Fund v. DEL Indus., Inc.*, 35 S.W.3d 591, 596 (Tex. 2000) ("It has long been the law in Texas that an employer may not split its workforce by providing workers' compensation insurance to some workers [*242] while leaving others without coverage.").[3]

2 Tex. Lab. Code § 406.002-.003. Other provisions of the TWCA confirm that an employer's election is generally [**8] for its workforce as a whole. *Seeid*. § 406.004 (requiring employer to notify division if it elects not to obtain coverage); *id*. § 401.011(18) (defining "employer" as "a person who makes a contract of hire, employs one or more employees, and has workers' compensation insurance coverage"); *id*. § 401.012(a) (defining "employee" as "each person in the service of another under a contract for hire"); *id*. § 406.031(a) ("An insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence if: (1) at the time of injury, the employee is subject to this subtitle; and (2) the injury arises out of and in the course and scope of employment."); *id*. § 406.005(c) ("Each employer shall post a notice of whether the employer has workers' compensation insurance coverage at conspicuous locations at the employer's place of business as necessary to provide reasonable notice to the employees.").

3 *See also Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 145 (Tex. 2003); *Md. Cas. Co. v. Sullivan*, 160 Tex. 592, 334 S.W.2d 783, 786 (Tex. 1960); *Pac. Indem. Co. v. Jones*, 160 Tex. 164, 327 S.W.2d 441, 443 (Tex. 1959); *Barron v. Standard Accident Ins. Co.*, 122 Tex. 179, 53 S.W.2d 769, 770 (Tex. 1932); *Buice v. Serv. Mut. Ins. Co.*, 90 S.W.2d 342, 343 (Tex. Civ. App.--Waco 1936, writ ref'd).

Statutes [**9] and the common law provide certain limited exceptions that allow an employer to split its workforce--but no exception applies here. First, an employer may operate more than one distinct kind of business and elect workers' compensation insurance for only one of its businesses. *Sullivan*, 334 S.W.2d at 786 ("an employee falls outside the coverage secured by an employer if the employer conducts two separate and distinct kinds of business, each of which involves different risks, payrolls and premium rates"). It is undisputed that Port Elevator operated only one

business. Second, an employer may elect to exclude a sole proprietor, partner or corporate executive officer. Tex. Lab. Code § 406.097. Port Elevator made two exclusions, but they were at the executive level. Third, an employer may lease staff from another company under the Staff Leasing Services Act (SLSA). *Id.* § 91.042. However, the SLSA does not apply to work that is "temporary or seasonal in nature." *Id.* § 91.001(14). Absent one of these statutory or common-law exceptions, an employer may not split its workforce.

[HN6]An employee may have more than one employer within the meaning of the TWCA, and each employer who subscribes to workers' [**10] compensation insurance may raise the exclusive-remedy provision as a bar to claims about the injury. *See Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 475-76 (Tex. 2005) (stating that client company could assert exclusive-remedy defense to claims by temporary employee if it was covered by workers' compensation insurance); *Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 143 (Tex. 2003) (holding that exclusive-remedy provision applied to both temporary staffing company and client company). In *Wingfoot*, we held that [HN7]an employee of a temporary staffing agency sent to a client company that directs the details of his work is an employee of both companies. 111 S.W.3d at 143. We explained that "an employee should not be placed in the position of trying to determine, perhaps at his or her peril, which of two entities was his or her employer on any given day or at any given moment during a day." *Id.* In *Garza*, we held that [HN8]a client company can avail itself of the exclusive remedy provision against claims by a temporary employee if either: (1) the client company was a named insured on the staffing company's policy; (2) the staffing company obtained a separate workers' compensation policy for the [**11] client company; or (3) the client company obtained its own workers' compensation policy. 161 S.W.3d at 480. We remanded because there was no evidence the client company had any such coverage. *Id.* at 481. In *Western Steel*, we stated that [HN9]the exclusive-remedy provision bars claims by a temporary worker against a client company if the client company establishes: (1) that it was the plaintiff's employer within the meaning of the TWCA, and (2) it subscribed to workers' compensation insurance. 206 S.W.3d at 123. We held that the exclusive-remedy provision barred that suit because the client company was the plaintiff's employer and was a workers' compensation subscriber. *Id.* at 124.

Here, the parties agree that Casados was an employee of both Staff Force and Port Elevator and that Port Elevator was a workers' compensation subscriber at the [*243] time of the accident. The parties disagree as to whether Casados was covered by Port Elevator's workers' compensation policy. However, [HN10]a client company is entitled to the exclusive remedy defense upon showing that it was the plaintiff's employer and that it was covered by a workers' compensation policy. *Id.* at 123. This is because the TWCA and our decisions [**12] are intended to prevent an employer from splitting its workforce by choosing coverage for some employees but not coverage for all--absent limited statutory or common-law exceptions. *See, e.g.*, Tex.Lab.Code §§ 401.011(18), 401.012(a), 406.002-.003, 406.031(a); *Wingfoot*, 111 S.W.3d at 145; *DEL Indus.*, 35 S.W.3d at 596. There is no evidence that any exception to the rule against splitting workforces applies here: (1) Port Elevator operated only one business; (2) Casados was not an officer of Port Elevator; and (3) Casados was a temporary employee, not a leased employee. Because Port Elevator was Casados's employer, it was a workers' compensation subscriber, and Casados's injury was work-related, Port Elevator conclusively proved its exclusive-remedy defense.

III.

Casados's parents would have us adopt an additional, intent-based exception to the rule against splitting workforces. Specifically, Casados's parents claim that Port Elevator intended to and did exclude Casados from coverage under its workers' compensation policy because: (1) Port Elevator did not pay premiums for temporary workers like Casados; (2) Casados was a temporary employee whose job classification was not listed in Port [**13] Elevator's policy; and (3) Texas Mutual denied coverage. We disagree that an employer can contract around the rule against split workforces or that the above three factors mean that Casados was not covered by Port Elevator's policy.

The exception that Casados's parents urge us to adopt would undermine the very purpose of our long-standing rule that an employer may not (intentionally or unintentionally) split its workforce. [HN11]An employer may not choose to exclude certain employees from coverage unless a statutory or common-law exception to the rule against split workforces applies. A key purpose of the rule against split workforces is that employees know whether they have the protections of workers' compensation coverage.[4] Allowing employers to select which employees to cover would not only violate our long-standing rule against split workforces but would also be in tension with our decision to liberally construe the TWCA to find coverage for employees. *Navarette*, 706 S.W.2d at 309-10. We see no compelling reason to so significantly alter the rule against split workforces by adopting Casados's parents' position.

4 *See Wingfoot*, 111 S.W.3d at 143(noting need for clarity in dual-employment [**14] situations of who the employers are and whether the employee is covered). The TWCA requires employers to notify their employees

> of coverage by posting a general notice. Tex. Lab. Code § 406.005(c) ("Each employer shall post a notice of whether the employer has workers' compensation insurance coverage at conspicuous locations at the employer's place of business as necessary to provide reasonable notice to the employees."). If employers could pick and choose which employees to cover, such provisions would be meaningless.

Casados's parents' three specific assertions are also unavailing. Their first assertion is that Casados was not covered because Port Elevator excluded him by failing to pay premiums for temporary workers. This assertion fails for two reasons. First, [HN12]premiums are an issue between the employer and the insurer; they do not affect the employee's coverage. [*244] *Tex. Emp'rs' Ins. Ass'n v. Stanton*, 140 S.W.2d 337, 339-40 (Tex. Civ. App.--Amarillo 1940, writ. ref'd) ("[T]he failure to pay the premiums which may be due upon a policy is a matter of no importance as between the insurer and the employee but only concerns the insurer and the employer."). If Port Elevator's policy had set [**15] out certain premiums solely for temporary workers and Port Elevator had not paid those premiums, Casados would still have been covered under the policy and the failure to pay premiums would be an issue between Port Elevator and Texas Mutual. *See* *Coal Operators Cas. Co. v. Richardson*, 414 S.W.2d 735, 738 (Tex. Civ. App.--Beaumont 1967, writ ref'd n.r.e.) ("This [workers' compensation] protection to plaintiff was not lost because his employer failed to pay the proper premium to the insurance company."). Second, even a clear and unambiguous attempt to exclude Casados from coverage would violate the rule against splitting workforces. *See supra* Part II.

Casados's parents' second assertion is that Casados was not covered by any job classification in Port Elevator's workers' compensation policy. As addressed in Part II, the rule against split workforces requires that all employees be covered--absent a limited statutory or common-law exception. Because no exception applies, it does not matter whether Casados was covered by a code classification.

Third, Casados's parents assert that Texas Mutual's denial of coverage means that Casados was not covered. Casados was covered by Staff Force's policy [**16] with Dallas Fire as well as Port Elevator's policy with Texas Mutual. Casados had the right to pursue workers' compensation benefits from Dallas Fire, Texas Mutual, or both. *See* *Wingfoot*, 111 S.W.3d at 143 (stating that the "employee should be able to pursue workers' compensation benefits from either" the temporary staffing company's carrier or the client company's carrier); *see also* Tex. Lab. Code § 410.033 (prescribing procedure for two or more carriers liable for compensation). Therefore, Casados's parents are only entitled to the recover workers' compensation benefits and the exclusive-remedy provision in the TWCA bars their negligence claim against Port Elevator. Tex. Lab. Code § 408.001(a).

In conclusion, because Port Elevator subscribed to workers' compensation insurance, Casados was an employee of Port Elevator, and he suffered a work-related injury, the TWCA-provided remedy against Texas Mutual was the exclusive remedy for his injury. Casados's parents' negligence claim against Port Elevator is barred. Accordingly, we reverse the judgment of the court of appeals and render judgment for Port Elevator.

Eva M. Guzman

Justice

OPINION DELIVERED: January 27, 2012

Citation #6
996 So. 2d 584

LEXSEE

Positive
As of: Apr 26, 2012

AGUILLARD SANCHEZ VERSUS HARBOR CONSTRUCTION CO., INC. CONSOLIDATED WITH: HARBOR CONSTRUCTION CO., INC. VERSUS GLOBAL FABRICATION & WELDING CONTRACTORS, LLC

NO. 2008-CA-0316 CONSOLIDATED WITH: NO. 2008-CA-0317

COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

2008-0316 (La.App. 4 Cir. 10/01/08); 996 So. 2d 584; 2008 La. App. LEXIS 1306

October 1, 2008, Decided

SUBSEQUENT HISTORY: Released for Publication December 5, 2008.
Writ denied by Sanchez v. Harbor Constr. Co., 2009 La. LEXIS 267 (La., Jan. 9, 2009)

PRIOR HISTORY: [**1]
APPEAL FROM CIVIL DISTRICT COURT, ORLEANS PARISH. NOS. 2003-6855 C/W 2007-6804, DIVISION "G-11". Honorable Robin M. Giarrusso, Judge.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: As a result of an administrative proceeding under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.S. § 901 et seq., appellant, a borrowing employer, sought review of a grant of summary judgment by the Civil District Court, Orleans Parish (Louisiana), in favor of appellee, a labor service, in the employer's declaratory judgment action to interpret a contract between the parties regarding indemnity for a worker's injuries.

OVERVIEW: The service provided the worker to the employer. An administrative law judge (ALJ) found that the employer was required to reimburse the service for all benefits previously paid under the LHWCA. The ALJ found that the question as to whether a contract between the service and the employer contained a valid and enforceable indemnification agreement was an issue to be determined by the court. On review, the court affirmed the grant of summary judgment under La. Code Civ. Proc. Ann. art. 966(A)(2). La. Rev. Stat. Ann. § 23:1031 was applicable only to state compensation issues, and under the LHWCA, the employer as a borrowing employer, was required to pay the compensation benefits of its borrowed employee in the absence of a valid indemnification agreement. Under La. Civ. Code Ann. art. 2054, the court found that the contract did not contain terms providing indemnity to the employer. Further, the broad language utilized in the contract was unambiguous and did not expressly indemnify the employer for the employee's claims. Thus, La. Civ. Code Ann. art. 2046 and 2051 did not permit the use of parol evidence to provide a different interpretation of the contract.

OUTCOME: The court affirmed the trial court's judgment.

CORE TERMS: summary judgment, indemnification, indemnity, borrowing, enforceable, workers' compensation, reimbursement, reimburse, Compensation Act, borrowed employee, compensation benefits, administrative proceedings, carrier's, compensation carrier, indemnity provision, parol evidence, unambiguous, indemnify, matter of law, federal law, borrowed servant, injured workers', liability coverages, contractually, unequivocally, indemnitee, relieve, genuine, temporary, novo

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1]Favored in Louisiana, the summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action' and shall be construed to accomplish these ends. An appellate court reviews a district court's decision granting summary judgment de novo, using the same standard applied by the trial court in deciding the motion for summary judgment. Under this standard, summary judgment shall be granted if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. Proc. Ann. art. 966(B).

Admiralty Law > Personal Injuries > Maritime Workers' Claims > Longshore & Harbor Workers' Compensation Act
Contracts Law > Contract Conditions & Provisions > Indemnity
Workers' Compensation & SSDI > Maritime Workers' Claims > Compensability > Longshore & Harbor Workers' Compensation Act > Awards > General Overview
Workers' Compensation & SSDI > Maritime Workers' Claims > Compensability > Longshore & Harbor Workers' Compensation Act > Coverage & Definitions > Employers
Workers' Compensation & SSDI > Third Party Actions > Third Party Liability
[HN2]Under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.S. § 901 et seq., a borrowing employer is required to pay the compensation benefits of its borrowed employee, and, in the absence of a valid and enforceable indemnification agreement, the borrowing employer is required to reimburse an injured workers' formal employer for any compensation benefits it has paid to the injured worker.

Contracts Law > Contract Conditions & Provisions > Indemnity
Contracts Law > Contract Interpretation > General Overview
Contracts Law > Formation > Meeting of Minds
Torts > Procedure > Multiple Defendants > Indemnity > Contractual Indemnity
Workers' Compensation & SSDI > Third Party Actions > Third Party Liability
[HN3]Indemnity in its most basic sense means reimbursement, and may lie when one party discharges a liability which another rightfully should have assumed. The general rules governing contract interpretation apply in construing a contract of indemnity. When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose. La. Civ. Code Ann. art. 2054.

Contracts Law > Contract Conditions & Provisions > Indemnity
Contracts Law > Contract Interpretation > General Overview
Evidence > Inferences & Presumptions > Inferences
Torts > Procedure > Multiple Defendants > Indemnity > Contractual Indemnity
Workers' Compensation & SSDI > Third Party Actions > Third Party Liability
[HN4]Long-established general principles of interpreting indemnity agreements require that indemnification for an indemnitee's own negligence be clearly and unequivocally expressed. An indemnity provision should be construed to cover all losses, damages, or liabilities which reasonably appear to have been within the contemplation of the parties. It should not be read, however, to impose liability for those losses or liabilities which are neither expressly within its terms nor of such a character that it can be reasonably inferred that the parties intended to include them within the indemnity coverage.

Contracts Law > Contract Interpretation > General Overview
Contracts Law > Contract Interpretation > Parol Evidence > General Overview
[HN5]When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. Civ. Code Ann. art. 2046. Further, though a contract is worded in general terms, it must be interpreted to cover only those things it appears the parties intended to include. La. Civ. Code Ann. art. 2051. The meaning and intent of the parties to the written contract must be sought within the four corners of the instrument and cannot be explained or contradicted by parol evidence.

COUNSEL: Richard S. Vale, Pamela F. Noya, BLUE WILLIAMS, L.L.P., Metairie, LA, COUNSEL FOR HARBOR CONSTRUCTION CO., INC.

Patrick H. Patrick , PATRICK MILLER, L.L.C., New Orleans, LA, COUNSEL FOR GLOBAL FABRICATION &

WELDING CONTRACTORS, LLC.

JUDGES: (Court composed of Judge Patricia Rivet Murray, Judge Terri F. Love, Judge David S. Gorbaty). MURRAY, J., CONCURS AND ASSIGNS REASONS.

OPINION BY: Terri F. Love

OPINION

[*585] [Pg 1] Aguillard Sanchez was the borrowed employee of the Harbor Construction Co., Inc. at the time of his personal injury; thereafter, he was awarded benefits under the Longshore and Harbor Workers' Compensation Act. Global asserts that Harbor is liable for benefits as a borrowing employer, and seeks reimbursement. Harbor denies the claim, alleging that the contract contains a valid and enforceable indemnification agreement. We find the contract language unambiguous and devoid of an indemnity provision.

We, therefore, hold that the contractual language does not constitute a "valid and enforceable indemnification agreement" that relieves Harbor of its obligation to reimburse [**2] Global for compensation benefits Global paid to Mr. Sanchez. Finding no error in the trial court's granting of the Cross-Motion for Summary Judgment in favor of Global, we affirm.

[*586] **FACTUAL AND PROCEDURAL HISTORY**

The instant facts are as we stated in *Sanchez v. Harbor Constr. Co., Inc.*, 07-0234, p. 1 (La. App. 4 Cir. 10/3/07) 968 So. 2d 783, 784:

> **"Global Fabrication and Welding ("Global") is a temporary labor service that supplies Harbor with workers on an 'as needed' basis. Harbor is a general construction company. On August 8, 2002, Harbor contacted Global and requested a welder for the [Pg 2] next day. On August 9, 2002, Global sent Mr. Sanchez to Harbor's jobsite, which was at the Napoleon Avenue Wharf. Global instructed Mr. Sanchez to report to Harbor's foreman. On his first day on the job, Mr. Sanchez was injured when a 500,000 gallon diesel fuel tank fell from the forklift that one of Harbor's employees, Mr. Nguyen, was operating**."

Aguillard Sanchez ("Mr. Sanchez") filed a civil claim against Harbor Construction Company ("Harbor"), its insurer and one of its employees. The defendants moved for summary judgment, arguing that Mr. Sanchez was the borrowed servant of Harbor and that his [**3] exclusive remedy was the Workers' Compensation Act. That Motion for Summary Judgment was granted and this Court affirmed the ruling in *Sanchez*, 07-0234, p. 1, 968 So. 2d 783. [1]

> 1 In parallel administrative proceedings under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., ("LHWCA"), it has been stipulated that Sanchez was Harbor's borrowed LHWCA employee.

Thereafter, Mr. Sanchez filed a claim under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33. U.S.C. § 904 et seq., seeking benefits from Global Construction Company ("Global") and Harbor. Mr. Sanchez sued his employer, Global, and its workers' compensation carrier for benefits. Global then asserted that as a borrowing employer, Harbor was liable for benefits. After an administrative proceeding, the administrative law judge ("ALJ") found that Mr. Sanchez was entitled to temporary total disability benefits. The ALJ also ordered that Harbor and its carrier reimburse Global and its carrier for all benefits previously paid Mr. Sanchez.

Global also asserts that as the "borrowing employer" of Sanchez, Harbor and its workers' compensation carrier are liable unto Global and its workers' compensation [**4] carrier for reimbursement of the benefits that Global and its carrier have previously provided. The ALJ found that the question of [Pg 3] whether a contract between Global and Harbor contains a valid and enforceable indemnification agreement that would serve as a bar to Global's and its carrier's reimbursement claim against Harbor is an issue that must be determined by a court of general jurisdiction.

Harbor filed a declaratory action against Global to have the trial court interpret the parties' contract. That declaratory action was consolidated with the previous matter that addressed the borrowed servant issue. Harbor and

Global moved for summary judgment.

The trial court denied Harbor's Motion for Summary Judgment and found that Global was not contractually liable for workers' compensation benefits due to Mr. Sanchez. The trial court based its finding on the absence of a "valid and enforceable indemnification agreement" in the contract. The trial court also granted a Cross-Motion for Summary Judgment in favor of Global. Harbor filed a supervisory writ from the denial of its Motion for Summary Judgment, which was denied by this Court, citing that Harbor had an adequate [*587] remedy on appeal. [**5] Subsequently, Harbor filed this appeal to address the denial of its Motion for Summary Judgment and the granting of Global's Cross-Motion for Summary Judgment.

STANDARD OF REVIEW

[HN1]"Favored in Louisiana, the summary judgment procedure 'is designed to secure the just, speedy, and inexpensive determination of every action' and shall be construed to accomplish these ends." *King v. Parish Nat'l Bank*, 04-0337, p. 7 (La. 10/19/04), 885 So. 2d 540, 545 (*quoting* La. C.C.P. art. 966(A)(2)). An [Pg 4] appellate court reviews a district court's decision granting summary judgment *de novo*, using the same standard applied by the trial court in deciding the motion for summary judgment. *Schmidt v. Chevez*, 00-2456, p. 4 (La. App. 4 Cir. 1/10/01), 778 So. 2d 668, 670. Under this standard, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

INDEMNIFICATION AGREEMENT

The issue before this Court is whether the Master Service Agreement ("contract") between Harbor and [**6] Global contains a valid and enforceable indemnification agreement that would serve to bar Global's reimbursement claim in the LHWCA administrative proceeding. Harbor argues that the language of the contract provides indemnity and was breached by Global in not procuring insurance that extended to the liabilities of Harbor as a borrowing employer. Harbor contends that the effect of the contract was to require Global to indemnify Harbor from workers' compensation suits brought by employees of Global.

Global counters that the contract merely requires Global to procure insurance covering its own workers' compensation obligations. Global maintains that the contract does not require Global to indemnify Harbor nor to insure the obligations of Harbor as an LHWCA employer. Under Global's line of reasoning, Harbor must reimburse Global for any compensation benefits paid by or on behalf of Global to Mr. Sanchez.

In the administrative proceeding, the ALJ determined that Harbor was liable for reimbursing Global for its payment of Mr. Sanchez's claims. The ALJ also [Pg 5] determined that the question of whether there were contractual grounds for relieving Harbor of this liability hinged on whether "a [**7] valid and enforceable" indemnification agreement between the parties existed. The ALJ stated that this inquiry was an appropriate issue for a state court to decide.

Harbor argues that the Louisiana workers' compensation statute, La. Rev. Stat. 23:1031, allows lending and borrowing employers to contractually agree who is to bear the liability for compensation for the borrowed employee and that the same rule applies under federal law. Global contends that whereas Louisiana state workers' compensation holds the lender and the borrower jointly and solidarily liable for benefits, the federal LHWCA rule places sole liability on one employer and, in the instance of a borrowed employee, the liable employer is the borrowing employer. Given that La. Rev. Stat. 23:1031 governs Louisiana state workers' compensation issues, we find it inapplicable in the instant matter.

[HN2]Under the LHWCA "a borrowing employer is required to pay the compensation benefits of its borrowed employee, and, in the absence of a **valid and** [*588] **enforceable indemnification agreement**, the borrowing employer is required to reimburse an injured workers' formal employer for any compensation benefits it has paid to the injured worker." [**8] (Emphasis added). *Total Marine Services, Inc. v. Director, OWCP (Arabie)*, 87 F.3d 774 (5th Cir. 1996).

The contract between Global and Harbor is the law between those parties and they are bound to their agreement. [HN3]"Indemnity in its most basic sense means reimbursement, and may lie when one party discharges a liability which another rightfully should have assumed." *Naquin v. Louisiana Power and Light Co.*, 05-2104, p. 4 (La. App. 1 Cir. 11/17/06), 951 So. 2d 228, 231. "The general rules governing contract interpretation apply in construing a contract of indemnity." *Id.* [Pg 6] "When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to **whatever the law, equity, or**

usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose." (Emphasis added). La. Civ. Code art. 2054.

In *Darty v. Transocean Offshore U.S.A., Inc.*., 03-1669, (La. 4 Cir. 5/12/04) 875 So. 2d 106, we determined whether a reciprocal indemnity provision clearly and unequivocally provided indemnification. In this Court's analysis, we considered *Theriot v. Bay Drilling Corp*., 783 F.2d 527, 540 (5 Cir. 1986) [**9] , which provided:

> [HN4]"Long-established general principles of interpreting indemnity agreements **require that indemnification for an indemnitee's own negligence be clearly and unequivocally expressed**." *Seal Offshore, Inc. v. American Standard, Inc*., 736 F.2d 1078, 1081 (5th Cir.1984). An indemnity provision should be construed to cover "all losses, damages, or liabilities which reasonably appear to have been within the contemplation of the parties." **It should not be read, however, "to impose liability for those losses or liabilities which are neither expressly within its terms nor of such a character that it can be reasonably inferred that the parties intended to include them within the indemnity coverage**." *Corbitt v. Diamond M. Drilling Co*., 654 F.2d at 333. (Emphasis added).

Darty v. Transocean Offshore U.S.A., Inc., 03-1669, (La. 4 Cir. 5/12/04) 875 So. 2d 106

The pertinent provision in the contract reads: "GFWC [Global] agrees to provide workers' compensation and general liability coverages within the limits required by the client [Harbor]." The operative provision of the Global-drafted contract failed to expressly provide for indemnity. In view of the contract as a whole [**10] and the omission of any reference in any form to "indemnity" in the contract provision, we conclude that the only reasonable interpretation of the contract is that Global would only be required to carry workers' compensation insurance.

[Pg 7] Based on our review of the record, we find that the contract does not contain terms providing indemnity to Harbor in the manner purported. Harbor's assignment of error does not have merit and we conclude that the trial court was correct in granting the Motion for Summary Judgment in favor of Global.

PAROL EVIDENCE

Harbor submits that while the terms and conditions of the contract are unambiguous, even if there were any ambiguity, it is dissipated by the parol evidence submitted. Harbor argues that the trial court had sufficient evidence to determine the [*589] parties' intent and grant summary judgment in its favor, and contends that the trial court erred in not so ruling.

Although Harbor requests that this Court look outside the contract to determine whether its indemnification claim is valid, we find no reason to do so. [HN5]"When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search [**11] of the parties' intent." La. Civ. Code art. 2046. Further, though a contract is worded in general terms, it must be interpreted to cover only those things it appears the parties intended to include. La. Civ. Code art. 2051. The meaning and intent of the parties to the written contract must be sought within the four corners of the instrument and cannot be explained or contradicted by parol evidence. *Bourgeois, Bennett, L.L.C. v. Gauthier, Downing, Labarre, Besier and Dean, a PLC, et al*., 07-842 (La. App. 5 Cir. 3/11/08) 982 So. 2d 127, 127 (*citing* La. Civ. Code art. 1848).

The contract between Global and Harbor must be given its plain and common sense meaning. In reviewing the contract as a whole, we find that the broad language utilized in the contract is unambiguous and does not expressly [Pg 8] indemnify Harbor for Mr. Sanchez's claims. Rather, we conclude that the agreement between the parties depicts an arrangement whereby Global, as a labor pool employer, provides employees to Harbor, and, as part of that arrangement, Global provides the workers' compensation insurance. Therefore, parol evidence is inadmissible to vary the contract.

DECREE

From our *de novo* review of the record, we [**12] find that there exists no genuine issue of material fact. From the law as cited above, we hold that Global is entitled to summary judgment as a matter of law. The judgment of the trial court is affirmed.

AFFIRMED

CONCUR BY: Patricia Rivet Murray

CONCUR

[Pg 1] **MURRAY, J., CONCURS AND ASSIGNS REASONS**

The sole issue before this court is whether the contract between Harbor and Global contains a "valid and enforceable indemnification agreement," in the absence of which the borrowing employer (Harbor) is required to reimburse the formal employer (Global) for LHWCA benefits it has paid to the injured employee. See *Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 463-64 (5th Cir. 2001) (quoting *Total Marine Services, Inc. v. Director, Office of Worker's Compensation Programs*, 87 F.3d 774, 779 (5th Cir. 1996)). It is well established that indemnity language in a contract must expressly and unambiguously relieve the indemnitee of the liability at issue. See *Roberts v. Williams-McWilliams Co, Inc.*, 648 F.2d 255, 264 (5th Cir. 1981). The provision in the instant contract merely states that Global will "provide workers compensation and general liability coverages within the limits required [**13] by [Harbor]." I agree with the majority that this language is insufficient to provide [Pg 2] indemnity and does not constitute a valid indemnification agreement under Louisiana or federal law.

Accordingly, I respectfully concur in the affirmation of the trial court's judgment.

Citation #7
2008 U.S. App. LEXIS 24484

LEXSEE

Analysis
As of: Apr 26, 2012

SAU DINH, Plaintiff - Appellant v. LOUISIANA COMMERCE AND TRADE ASSOCIATION SELF INSURERS' FUND, Defendant - Appellee

No. 08-30580 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2008 U.S. App. LEXIS 24484

December 2, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Related proceeding at Sau Dinh v. Stalker, 2010 U.S. Dist. LEXIS 21290 (E.D. La., Mar. 9, 2010)

PRIOR HISTORY: [*1]
Appeal from the United States District Court for the Eastern District of Louisiana. USDC No. 2:06-CV-9653.
Dinh v. La. Commerce & Trade Association-Self Insurers Fund, 2008 U.S. Dist. LEXIS 42080 (E.D. La., May 27, 2008)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, an injured payroll employee, appealed a summary judgment granted by the United States District Court for the Eastern District of Louisiana in favor of defendant, an employer's insurance carrier, alleging that the carrier was liable for benefits due the employee under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.S. § 901 et seq. The district court also denied the employee's summary

judgment motion.

OVERVIEW: The appeal arose from a dispute over whether a certificate of insurance issued by the carrier to the employer provided coverage for benefits owed under the LHWCA to the employee, who sustained injuries while working for a borrowed employer. The district court found that because the borrowed employer was the responsible employer for the benefits as determined from an unappealed compensation order under 33 U.S.C.S. § 921(b), the injuries did not implicate the certificate. On review, the court affirmed the grant of summary judgment to the carrier. Payments owed by the employer to the borrowed employer under an indemnity provision of the parties' out-source agreement were not benefits required of the employer by compensation law; rather they were liabilities that the employer had assumed under contract. The rules of contractual construction of La. Civ. Code Ann. art. 2050 did not allow the court to ignore an explicit exclusion of contractual liabilities or the express limitation to the benefits owed by the employer under workers' compensation law. Further, the employee's expectations could not bind the carrier without its knowledge or consent, pursuant to La. Civ. Code Ann. art. 1927.

OUTCOME: The court affirmed the district court's judgment.

CORE TERMS: coverage, compensation law, compensation benefits, borrowed employee, insurance policy, summary judgment, coverage afforded, indemnity agreement, unambiguous, ambiguity, construe, paying, administrative law, indemnity clause, reasonable expectations, contractual, borrowing, indemnify, ambiguous, borrowed, carrier, owed, owes, premium, administrative ruling, insurance contract, indemnity obligations, deputy commissioner, citations omitted, liabilities assumed

LexisNexis(R) Headnotes

Admiralty Law > Personal Injuries > Maritime Workers' Claims > Longshore & Harbor Workers' Compensation Act
Workers' Compensation & SSDI > Maritime Workers' Claims > Compensability > Longshore & Harbor Workers' Compensation Act > Awards > Benefits > General Overview
Workers' Compensation & SSDI > Maritime Workers' Claims > Compensability > Longshore & Harbor Workers' Compensation Act > Coverage & Definitions > Employers
[HN1]If a contractor is an employee's employer under the borrowed servant doctrine, the contractor is liable for compensation benefits under the Longshore and Harbor Workers' Compensation Act.

Admiralty Law > Personal Injuries > Maritime Workers' Claims > Longshore & Harbor Workers' Compensation Act
Workers' Compensation & SSDI > Maritime Workers' Claims > Compensability > Longshore & Harbor Workers' Compensation Act > Awards > Benefits > General Overview
Workers' Compensation & SSDI > Maritime Workers' Claims > Compensability > Longshore & Harbor Workers' Compensation Act > Awards > Hearings & Review
Workers' Compensation & SSDI > Maritime Workers' Claims > Compensability > Longshore & Harbor Workers' Compensation Act > Judicial Review
[HN2]33 U.S.C.S. § 921(b) provides that a compensation order becomes effective when filed with the deputy commissioner and becomes final unless an appeal is filed within thirty days thereafter.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN3]An appellate court reviews a grant of summary judgment de novo, applying the same standard as the district court. A district court properly grants summary judgment if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Contracts Law > Contract Interpretation > General Overview

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview
[HN4]Under Louisiana law, an insurance policy is a contract that courts should construe by employing the general rules of interpretation set forth in the Louisiana Civil Code. Under the Civil Code, the parties' intent, as reflected by the words of the policy, determines the extent of coverage. Each provision of the policy must be interpreted in light of the other provisions so that each is given the meaning suggested by the policy as a whole. La. Civ. Code Ann. art. 2050 (1985). A court must avoid construing the policy in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. Where the language in the policy is clear, unambiguous, and expressive of the parties' intent, the court must enforce the agreement as written.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview
Contracts Law > Contract Interpretation > Parol Evidence > General Overview
[HN5]Extrinsic evidence is inadmissible to make ambiguous an otherwise unambiguous contract.

Contracts Law > Formation > Meeting of Minds
[HN6]A valid contract requires the mutual consent of all contracting parties. La. Civ. Code Ann. art. 1927 (1985).

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview
Insurance Law > Claims & Contracts > Policy Interpretation > Reasonable Expectations > General Overview
[HN7]The reasonable expectations doctrine applies only if the contract at issue is first found to be ambiguous.

JUDGES: Before JOLLY, BENAVIDES, and HAYNES, Circuit Judges.

OPINION

PER CURIAM: *

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Plaintiff Sau Dinh, an employee of Structure Services, suffered injuries while performing work for his borrowed employer, KYE, Inc. Following an administrative case holding KYE the responsible employer for Dinh's benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq.*, Dinh sued Structure's insurance carrier, the Louisiana Commerce and Trade Association Self Insurer Fund (the Fund), arguing that it ought nonetheless be responsible for his LHWCA benefits. The district court granted summary judgment in favor of the Fund, finding that its coverage obligations did not extend to the benefits at issue. We affirm.

I. FACTS

This appeal arises from a dispute over whether the Certificate of Insurance (Certificate) issued by the Fund to Structure provides coverage for benefits owed under the LHWCA [*2] to Dinh, a payroll employee of Structure who sustained injuries while working for KYE as a borrowed employee.

The Fund was the workers' compensation carrier for Structure. Pursuant to an Out Source Agreement, Structure provided laborers, including Dinh, to work at KYE's shipyard. While working aboard a KYE vessel, Dinh sustained injuries entitling him to benefits under the LHWCA. The Fund, as Structure's carrier, began paying these benefits.

Thereafter, Dinh filed a tort suit against a number of defendants, including KYE. The Fund intervened in the suit and sought reimbursement from KYE for the compensation benefits it had paid Dinh. The Fund argued that KYE, as Dinh's "borrowed employer," was Dinh's employer under the LHWCA and, as such, was solely responsible for the payment of his worker's compensation benefits. *See* *Temp. Employment Servs. v. Trinity Marine Group, Inc.*, 261 F.3d 456, 459-60 (5th Cir. 2001) (citing *Total Marine Servs., Inc. v. Dir., OWCP*, 87 F.3d 774, 779 (5th Cir. 1996)) ([HN1]"If the contractor is the employee's 'employer' under the borrowed servant doctrine, the contractor is liable" for compensation benefits under the LHWCA.). The district court held that Dinh was KYE's [*3] borrowed employee, but that an indemnity clause in the Out Source Agreement between KYE and Structure barred the Fund's claim against KYE

for reimbursement of LHWCA benefits that the Fund had paid to Dinh. [1] The Fund appealed that ruling and we affirmed. *Dinh v. Am. Freedom Vessel,* 155 F. App'x 137 (5th Cir. 2005) (unpublished). As a result of the finding that KYE was the borrowing employer of Dinh, the Fund ceased paying Dinh compensation benefits.

1 In relevant part, the Out Source Agreement provides:

> Structure Services, Ltd. Agrees to indemnify and hold [KYE] harmless from any claim due to negligence or injuries of their employees or by any governmental claim for withholding taxes, F.I.C.A. taxes and unemployment taxes attributable to covered workers.

After the Fund ceased paying Dinh's benefits, he filed a claim with the United States Department of Labor for his LHWCA benefits against Structure, the Fund, and KYE. The administrative law judge found that KYE, as Dinh's borrowing employer, was the party responsible for paying Dinh's benefits under the LHWCA. Dinh also contended that the indemnity clause between Structure and KYE, in conjunction with the Certificate between Structure [*4] and the Fund, obligated the Fund to pay Dinh's LHWCA benefits. The administrative law judge did not reach this issue. Rather, he determined that he lacked jurisdictional authority to construe the relevant contracts based on our decision in *Trinity,* 261 F.3d at 456. Although Dinh had a statutory right to appeal the administrative ruling, he declined to do so. *See* 33 U.S.C. § 921(b) (1984).

Dinh subsequently filed this lawsuit, seeking to hold the Fund responsible for his LHWCA benefits. The parties filed cross-motions for summary judgment; the district court granted the Fund's motion and denied Dinh's motion. In so ruling, the district court focused primarily on the Certificate between Structure and the Fund. The district court determined that, regardless of Structure's obligation to indemnify KYE under the Out Source Agreement, the unambiguous language of the Certificate limited the Fund's coverage to Structure's obligations under the worker's compensation law. Because KYE was the responsible employer for Dinh's LHWCA benefits, the district court determined that his injuries did not implicate the Certificate between Structure and the Fund. This appeal ensued.

II. DISCUSSION

The scope [*5] of our inquiry in this appeal is limited. As mentioned, we have already held that the Out Source Agreement between Structure and KYE contains a valid indemnification clause, obligating Structure to indemnify KYE for any compensation benefits KYE owes to a borrowed employee. *See Dinh,* 155 F. App'x 137. Additionally, the administrative law judge has determined that KYE, as the borrowing employer, is the responsible employer for Dinh's LHWCA benefits, and Dinh has not appealed that ruling. [2] Thus, the sole issue before this Court is whether the Certificate extends the Fund's coverage obligations to compensation benefits that Structure owes under an indemnity agreement. We agree with the district court that it does not.

2 The time for Dinh to appeal this ruling has expired. [HN2]Section 921(b) provides that a compensation order becomes effective when filed with the deputy commissioner and becomes final unless an appeal is filed within thirty days thereafter. The compensation order in this case was filed with the deputy commissioner on March 14, 2006.

[HN3]We review a grant of summary judgment de novo, applying the same standard as the district court. *Chacko v. Sabre, Inc.,* 473 F.3d 604, 609 (5th Cir. 2006). [*6] A district court properly grants summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

The parties agree that Louisiana law must guide our interpretation of the Certificate. [HN4]Under Louisiana law, an insurance policy is a contract that courts should construe by employing the general rules of interpretation set forth in the Louisiana Civil Code. *Reynolds v. Select Properties, Ltd.,* 634 So. 2d 1180, 1183 (La. 1994) (citations omitted). Under the Civil Code, "[t]he parties' intent, as reflected by the words of the policy, determine[s] the extent of coverage." *Id.* "Each provision [of the policy] must be interpreted in light of the other provisions so that each is given the meaning suggested by the [policy] as a whole." LA. CIV. CODE ANN. art. 2050 (1985). We must avoid construing the policy in an "unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion." *Reynolds,* 634 So. 2d at 1183 [*7] (citations omitted). "Where the language in the policy is clear, unambiguous, and expressive of the" parties' intent, we must

enforce the agreement as written. *Id.*

The Certificate is an insurance contract between Structure and the Fund -- KYE is not a party to that agreement. The Certificate contains two provisions potentially applicable here. Part One states "[The Fund] will pay promptly when due the benefits required of [Structure] by the Worker's Compensation Law of Louisiana." The Fund does not contest that Part One provides coverage for benefits required of Structure under the LHWCA despite contrary language in the policy. Under Part Two, the Fund agrees to:

> [P]ay on behalf of [Structure] all sums which [Structure] shall become legally obligated to pay as damages because of bodily injury by accident or bodily injury by disease, including death resulting therefrom, sustained only within the State of Louisiana by any employee of [Structure] arising out of and in the course of his employment by [Structure] in operations within the State of Louisiana only.

Part Two, however, excludes "[l]iability assumed under contract" from the Fund's coverage obligations. [3]

> 3 Part Two also excludes coverage [*8] for bodily injury resulting from work covered by the LHWCA. It further excludes coverage for any "obligation imposed by a Workers' Compensation . . . law, or any other similar law."

It is clear that neither of these provisions extends the Fund's coverage obligations to liabilities which Structure assumes under an indemnity agreement. The coverage afforded to Structure by Part Two explicitly excludes liabilities assumed by contract. Part One, by its express terms, applies only to "benefits required of [Structure] by the Worker's Compensation Law of Louisiana." Payments that Structure owes to KYE under the indemnity provision of the parties' Out Source Agreement are not benefits required of Structure by the compensation law; rather, they are liabilities that Structure has assumed under contract. Indeed, Dinh has already obtained an administrative ruling that KYE is the responsible employer for the purpose of Dinh's LHWCA benefits. That decision establishes that the compensation law does not require Structure to pay Dinh any benefits for injuries he suffered while working for KYE as a borrowed employee. In order to extend the Fund's coverage obligations to Dinh's LHWCA benefits, we would [*9] have to ignore Part Two's explicit exclusion of contractual liabilities or Part One's express limitation to the benefits owed by Structure under Louisiana's worker's compensation law. The rules of contractual construction allow us to do neither. *See Reynolds,* 634 So. 2d at 1183.

Dinh argues that the Certificate is ambiguous because the coverage afforded by Part One does not explicitly exclude liability assumed under contract as does the coverage afforded by Part Two. Dinh's argument ignores the fact that an exclusion is required only if an event otherwise would be covered by the language of the policy. Part One does not cover indemnity obligations and, therefore, does not need an exclusion for such assumed liabilities. Unlike Part One, the coverage afforded by Part Two could cover liabilities that Structure contractually assumed were it not for the explicit exclusion. Thus, no ambiguity exists.

Dinh argues further that ambiguity in the Certificate exists because, while the language of Part One limits coverage to claims under Louisiana compensation law, the Fund admits that coverage under this part extends to LHWCA claims (claims under federal law). Such [HN5]extrinsic evidence, however, is [*10] inadmissible to make ambiguous an otherwise unambiguous contract. *See Grant v. Ouachita Nat'l Bank,* 536 So. 2d 647, 652 (La. Ct. App. 1988). The fact that the parties, by practice, have extended the Fund's obligations beyond the Certificate's explicit terms cannot be used to create an ambiguity in the language of the Certificate where none exists.

Nor can Dinh's expectations bind the Fund without its knowledge or consent. [HN6]A valid contract requires the mutual consent of all contracting parties. *See* LA. CIV. CODE ANN. art. 1927 (1985). Here, regardless of Structure and KYE's expectations concerning the scope of the Fund's coverage, only the Fund could agree to cover Structure for indemnity payments owed to KYE. *See generally Evanston Ins. Co. v. Atofina Petrochemicals, Inc.,* 256 S.W.3d 660, 664 (Tex. 2008) (applying Texas law). [4]

> 4 In *Evanston,* the Texas Supreme Court was faced with the question of whether an indemnity agreement between the parties that formed the basis for one party's purchase of insurance covering the other could limit the terms of the policy actually purchased. It held that the insurance policy, not the indemnity agreement, governed the insurer's obligations. 256 S.W.3d at 664.

In [*11] support of his argument that the Certificate itself covers the benefits at issue here, Dinh notes that the

Certificate provides the Fund a right to adjust Structure's insurance premiums based on its actual exposure risk. To give effect to this right, the Certificate requires that Structure maintain records and contracts relevant to coverage and provides the Fund with the right to conduct an audit. The right to adjust premiums does not constitute an agreement to insure an unknown contract. As previously discussed, the indemnity clause of the Out Source Agreement between Structure and KYE is not relevant to the Fund's coverage obligations, because Structure's contractual obligations do not come within the scope of the Certificate's coverage provisions. [5]

> 5 Dinh also argues that The Fund did in fact conduct an audit of Structure's records and identified and considered Dinh's wages in calculating Structure's adjusted premium. As mentioned, however, The Fund only became aware of the Out Source Agreement following Dinh's injuries and thus did not include the specific risks associated with his work for KYE when making this calculation. Regardless, the parties' actions cannot trump the plain [*12] language of the Certificate which excludes Dinh's compensation benefits from coverage.

Finally, Dinh argues that, under the "reasonable expectations doctrine," we must construe the Certificate in favor of coverage because Structure reasonably expected its LHWCA coverage with the Fund to extend to KYE. As the district court correctly noted, however, [HN7]the "reasonable expectations doctrine" applies only if the contract at issue is first found to be ambiguous. *See* *Coleman v. Sch. Bd. of Richland Parish,* 418 F.3d 511, 517 (5th Cir. 2005) (The "reasonable expectations doctrine" provides that "ambiguities within an insurance policy will be resolved by ascertaining how a reasonable insurance policy purchaser would construe the clause at the time the insurance contract was entered." (internal quotations omitted)). As the Certificate here is unambiguous, the doctrine does not apply. Given the plain wording of the Certificate, Structure could only ensure coverage for its indemnity obligations under the Out Source Agreement by obtaining the Fund's consent. Because Structure failed to obtain this consent, the district court's judgment must be affirmed.

III. CONCLUSION

The district court's judgment [*13] is AFFIRMED.

Citation #8
601 S.W. 2d 466

LEXSEE

Cited
As of: Apr 26, 2012

Safeco Insurance Company of America, Appellant v. Birl Broadnax, Appellee

No. 20266

Court of Civil Appeals of Texas, Dallas

601 S.W.2d 466; 1980 Tex. App. LEXIS 3503

May 23, 1980

SUBSEQUENT HISTORY: [**1] Rehearing Denied June 26, 1980.

PRIOR HISTORY: From A District Court of Dallas County, Texas.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant insurer challenged a decision from a District Court of Dallas County (Texas), which awarded workers' compensation benefits to appellee employee after he had settled his workers' compensation

claim with another insurer.

OVERVIEW: After appellee temporary employee settled a claim against another insurer, asserting he was an employee of a placement service, he then sued appellant insurer for the same injuries, claiming he was a borrowed servant. The trial court found in favor of appellee. Appellant insurer argued that appellee was judicially estopped to assert the claim predicated upon facts contrary to those asserted in the first suit against the other insurer. Appellant argued he was entitled to double recovery. The court held that acceptance of the settlement barred the subsequent suit because appellant had attempted to obtain two recoveries for his injury based on assertions of conflicting facts, i.e., that he was an employee of two different employers at the same time for the purpose of collecting workers' compensation benefits from both.

OUTCOME: The court reversed the decision which awarded benefits to appellee employee holding his settlement with the first insurer barred recovery from appellant insurer because he had attempted to obtain double recovery of workers' compensation benefits by asserting conflicting facts as to his employer in each claim.

CORE TERMS: settlement, carrier, compensation carrier, legal remedies, insurance policies, compensation benefits, subsequent suit, judicial proceeding, asserting, insurer, workers' compensation, time of injury, predicated, coverage, serving, compensation act, insurance carrier, compensation case, compensation proceeding, jury verdict, attorney's fees, borrowed servant, per curiam, medical services, factual assertions, legal theories, failure to obtain, statutory remedy, subscriber, discovery

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel
[HN1]Receipt of a settlement in an action against the insurance company, based on an assertion that the loss was covered by insurance, precluded a subsequent suit based on an inconsistent factual theory, i. e., that the loss was not covered by insurance.

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
[HN2]The court perceives no reason why an injured workman should have any more latitude in asserting inconsistent facts in judicial proceedings than other plaintiffs. Thus, the court rejects the broad assertion that the Huckabee rule is inapplicable merely because this is a workers' compensation action.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees
[HN3]See Tex. Rev. Civ. Stat. Ann. art. 8307 § 5c (Supp.1980).

COUNSEL: Chester G. Ball, Arlington, for appellant.

William T. Catterton, Ford, Livingston & Needham, Dallas, for appellee.

JUDGES: Guittard, C.J., and Akin and Storey, JJ.

OPINION BY: AKIN

OPINION

[*466] This is an appeal by the insurance carrier, Safeco Insurance Company of America, in a workers' compensation case. After a jury verdict in favor of Broadnax, the trial judge rendered judgment against the insurance carrier for $ 6,728.54 plus attorney's fees. Broadnax had previously filed a claim and a lawsuit against Travelers Insurance for the same injury asserting that he was the employee of Labor Placement and had obtained a $ 12,000 settlement from Travelers. In this suit, he claimed that he was a "borrowed servant" of Bill Jackson, Inc., and thus

Jackson's compensation carrier, Safeco, was liable under its workers' compensation policy with Jackson. Safeco appeals on the ground that Broadnax is judicially estopped to assert a claim against Safeco predicated upon facts contrary to those asserted in the suit against Travelers under the doctrine enunciated by the supreme court in [**2] Lomas & Nettleton Co. v. Huckabee, 558 S.W.2d 863 (Tex.1977) (per curiam). We agree and accordingly reverse the judgment of the trial court and render judgment that Broadnax take nothing.

Broadnax was an employee of Labor Placement, a supplier of temporary workers. He was sent by Labor Placement for daily contract labor to Bill Jackson, Inc., where he was injured. On July 27, 1977, Broadnax filed a claim for workers' compensation against Travelers Insurance, Labor Placement's workers' compensation carrier. That claim resulted in a lawsuit that [*467] was settled on August 8, 1978, for $ 12,000. Additionally, Travelers paid all of Broadnax's medical expenses. On March 20, 1978, during the pendency of the claim against Travelers, Broadnax filed a claim and a suit against Safeco insurance, the workers' compensation carrier of Bill Jackson, Inc., based on the same injury. This claim against Safeco was predicated upon Broadnax's contention that he was a borrowed servant and thus an employee of Bill Jackson, Inc. because he was actually working under the direction and control of Jackson, Inc. when he was injured. Based upon a favorable jury verdict, Broadnax was awarded $ [**3] 6,728.54 and attorney's fees in a judgment against Safeco. Safeco appeals.

Safeco contends that the trial court erred in overruling its motions for instructed verdict and judgment n. o. v. on the grounds that Broadnax's suit was barred under the doctrine of Lomas and Nettleton Co. v. Huckabee, 558 S.W.2d 863 (Tex.1977) (per curiam). We agree. That case concerned a suit to recover fire loss for Huckabee's property. Huckabee sued the insurance company on the theory that his loss was covered by insurance policies and received a settlement covering all of his real property loss and 80% of his personalty loss. Huckabee then attempted to recover from Lomas & Nettleton, a mortgage escrow account management firm, on the ground that the loss was not covered by insurance due to the wrongful acts of that defendant. The supreme court held that the [HN1]receipt of a settlement in the action against the insurance company, based on an assertion that the loss was covered by insurance, precluded a subsequent suit based on an inconsistent factual theory, i. e., that the loss was not covered by insurance. We hold that the instant case is controlled by Huckabee. The settlement with Travelers, based [**4] on the assertion that Broadnax was an employee of Labor Placement at the time of injury, precludes Broadnax from suing Safeco, under the allegation that he was not an employee of Labor Placement, but was in fact employed by Bill Jackson, Inc.

Broadnax argues that the instant suit is not barred by either judicial estoppel, election of remedies, or the doctrine that prohibits double recovery. He cites cases to establish the classical elements of each of these legal theories and contends that none of them bar suit in the instant case. We do not necessarily disagree but these points are irrelevant to the case at bar under the Huckabee estoppel doctrine. We have previously analyzed the Huckabee rule in light of existing legal theories and concluded that it does not fall within any of the existing doctrines mentioned above. Metroflight, Inc. v. Shaffer, 581 S.W.2d 704, 707 (Tex.Civ.App. Dallas 1979, writ ref'd n. r. e.).

In Metroflight, we construed the Huckabee rule to bar a plaintiff, who asserts the existence of a set of facts in a judicial proceeding and receives a recovery in that proceeding, from subsequently asserting an inconsistent set of facts in order to obtain a further [**5] recovery based on the same transaction or occurrence. Id. at 706. In Metroflight, the plaintiff sought recovery under an insurance policy but after discovery found that the coverage was excluded by a policy provision and that the exclusion had not been waived by the insurer. Nonetheless, the plaintiff accepted a settlement from the insurance company even though the facts adduced in discovery revealed that it had no enforceable remedy under the insurance policy. Id. at 708. We held that acceptance of the settlement barred a subsequent suit against plaintiff's insurance agent for failure to obtain adequate coverage. Id. at 710. Broadnax argues that Huckabee and Metroflight are predicated upon a choice between inconsistent legal remedies, i. e., a suit on the insurance policy or a suit against the agent for failure to obtain adequate coverage. He contends that the case at bar is distinguishable because he has only one legal remedy, a suit under workers' compensation act. Thus he has not chosen a legal remedy but merely made inconsistent factual assertions in an attempt to enforce his only available legal remedy. We do not agree. Under our view of the Huckabee rule, as expressed [**6] in Metroflight, and set out above, the existence of two inconsistent [*468] legal remedies is not a predicate to the application of Huckabee. It is Broadnax's attempt to obtain two recoveries for his injury based on assertion of two conflicting facts, i. e., that he was an employee of two different employers at the same time for the purpose of collecting workers' compensation benefits from the insurers of both.

Broadnax argues that the Huckabee rule should not be applied in a workers' compensation case because of a public policy favoring recovery for the injured workman. [HN2]We perceive no reason why an injured workman should have any more latitude in asserting inconsistent facts in judicial proceedings than other plaintiffs. Thus we must reject the broad assertion that the Huckabee rule is inapplicable merely because this is a workers' compensation action. We also

note that the Huckabee rule has been applied to cases concerning injured workmen. Thate v. Texas & Pacific Railway Co., 595 S.W.2d 591 (Tex.Civ.App. Dallas 1980, writ filed); Aetna Life Insurance Co. v. Bocanegra, 572 S.W.2d 355 (Tex.Civ.App. San Antonio 1978, writ granted).

Broadnax argues that Safeco had a [**7] remedy under the workers' compensation act and that this statutory remedy supplants the Huckabee rule in a workers' compensation action. The first sentence [HN3]of Tex.Rev.Civ.Stat.Ann. art. 8307 § 5c (Vernon Supp.1980) provides:

> In any proceeding in which it is determined that compensation, including costs for medical services incurred, is allowable in a sum certain for injuries sustained by an employee, but there is a dispute with respect to which of two or more subscribers said employee was serving at the time of injury, the Association and other workmen's compensation insurer, or insurers, of each such subscriber shall be required to deposit with the Board or court a proportionate share of the compensation awarded, including costs for medical services incurred, for the injuries received.

As we read article 8307 § 5c, that section shows no legislative intent to preclude the application of the Huckabee rule in a workers' compensation proceeding. In our view, the purpose of that section is not to prevent two recoveries based on inconsistent factual assertions as in Huckabee, but rather to assure that the worker who is entitled to compensation benefits will receive them [**8] during the pendency of a dispute as to which compensation carrier is liable for those benefits. Thus that section is not a statutory remedy of the compensation carrier as Broadnax contends, but is a right to be asserted by the injured worker. It has no application in a situation such as the case at bar, where the worker does not prosecute his claim against both carriers as contemplated by art. 8307 § 5c but settles with one carrier prior to trial based on the factual assertion that the worker was serving that carrier's insured at the time of the injury. In such a situation the rule of Huckabee clearly applies to bar a subsequent suit against carrier based on the inconsistent assertion that the worker was serving a different employer at the time of injury.

Broadnax argues that by holding that Huckabee applies to a workers' compensation proceeding we would hinder the effective operation of that act. He points out that benefits are often paid and then it is subsequently determined that the carrier is not liable. He argues that our holding precludes the claimant in such a situation from proceeding against the party that is actually liable to him. We do not agree. We do not hold [**9] that receipt of compensation benefits from one carrier precludes a suit against another compensation carrier. It is the assertion of the right to benefits in a judicial proceeding and a subsequent settlement of the dispute that precludes a subsequent suit based on the same claim but asserting inconsistent facts. A claim for compensation and receipt of benefits does not activate the Huckabee rule so as to bar subsequent litigation against another carrier. Our holding in Thate v. Texas & Pacific Railway Co., 595 S.W.2d 591 (Tex.Civ.App. Dallas 1980, writ filed) is not inconsistent with this proposition since Thate also concerned the assertion of the right to workers' compensation benefits in a judicial proceeding. We need not pass on whether the Huckabee doctrine would bar Broadnax's [*469] claim and recovery before the Industrial Accident Board because that question is not presented here.

Accordingly, the judgment of the trial court is reversed and judgment here rendered that Broadnax take nothing.

Citation #9
70 NC App 408

LEXSEE

Positive
As of: Apr 26, 2012

ROBERT L. HENDERSON, Plaintiff-Employee v. MANPOWER OF GUILFORD COUNTY, INC., and/or BENNER & FIELDS, INC., Defendant-Employers and THE HOME INDEMNITY COMPANY and/or MICHIGAN MUTUAL INSURANCE COMPANY, Defendant-Insurance Carriers

No. 8310IC941

COURT OF APPEALS OF NORTH CAROLINA

70 N.C. App. 408; 319 S.E.2d 690; 1984 N.C. App. LEXIS 3699

June 5, 1984, Heard in the Court of Appeals
September 18, 1984, Filed

PRIOR HISTORY: [***1] Appeal by defendants Manpower of Guilford County, Inc. and The Home Indemnity Company from Opinion and Award of the North Carolina Industrial Commission entered 15 June 1983.

DISPOSITION: Vacated and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant general employer and its insurer challenged a judgment of the North Carolina Industrial Commission (commission), which awarded plaintiff employee workers' compensation payments against the general employer and its insurer only and not against defendant special employer and its insurer. The commission found that the employee was not employed by the special employer.

OVERVIEW: The special employer was a customer of the general employer, which sent the employee to work for the special employer. The employee was subject to discharge by the special employer at the special employer's discretion and the special employer furnished all the tools for the employee. The special employer paid the general employer a wage per hour for the hours that the employee worked for the special employer. The employee was injured while cutting trees and clearing land for the special employer at which time he was under the sole control and supervision of the special employer. The court vacated the commission's award for the employee, which provided that only the general employer and its insurer were liable for the payments, and remanded for the entry of an award which provided for the liability of the special employer and its insurer for such payments as well. The court held that the evidence showed that the employee was an employee of both the general employer and the special employer within the Workers' Compensation Act, specifically N.C. Gen. Stat. § 97-2(2). Additionally, the court found that there was an implied contract between the employee and the special employer.

OUTCOME: The court vacated the employee's award of workers' compensation payments against the general employer and its insurer only and remanded for the entry of an award for the employee which included liability for workers' compensation payments as to the special employer and its insurer.

CORE TERMS: special employer, customer's, terminate, supervision, servant, supervisor, workers' compensation, contractor, obligated, general employer, workmen's compensation, furnishing, borrower's, cutting, loaned, saw fit, satisfactory, supplier, furnish, assign, Compensation Act, special employee, contract of hire, borrowed, workmen's, rented, paving, hired, hire, right to discharge

LexisNexis(R) Headnotes

Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
[HN1]A borrower, from the nature of things, has only the power to terminate the loan and after terminating it has no control whatever over that which has been borrowed and returned. Yet, a general employee of one can also be the special employee of another while doing the latter's work and under his control. And if a loaned servant is the borrower's servant also when doing the borrower's work and under his control, a servant who is especially hired out for that very purpose is likewise.

Labor & Employment Law > Employment Relationships > Employment at Will > Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Dual Employees

[HN2] N.C. Gen. Stat. § 97-2(2) defines an employee as every person who is engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written. Nevertheless, it is fundamental that under some circumstances a person can be an employee of two different employers at the same time, in which event either employer or both may be liable for Workers' Compensation. Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen's compensation.

Workers' Compensation & SSDI > Coverage > Employment Relationships > Borrowed Employees
Workers' Compensation & SSDI > Coverage > Employment Relationships > Employers
[HN3]The test for determining the liability of special employers in loaned employee cases is stated as follows: When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if (a) the employee has made a contract of hire, express or implied, with the special employer; (b) the work being done is essentially that of the special employer; and (c) the special employer has a right to control the details of the work. When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.

HEADNOTES

Master and Servant § 53 -- workers' compensation -- dual employment

Defendant construction company was a special employer of plaintiff and was therefore liable equally with defendant supplier of temporary workers for compensating plaintiff for an injury arising out of and in the course of his employment where the evidence tended to show that cutting trees and clearing lands, the work that injured plaintiff, was entirely the work of defendant construction company; in doing that work, plaintiff was under the sole control and supervision of the construction company which not only controlled the details of that work, but also had the right to discharge plaintiff from that work at will; defendant supplier had no control over plaintiff while he was working for the construction company, nor did it have any interest in controlling him during such time, since its business was hiring employees to others for their use; and the only control defendant supplier had over plaintiff [***2] was the power to assign him to an employer interested in renting his services, to establish his rate of pay on each job, and to terminate his connection with it when it saw fit.

SYLLABUS

At the time involved in this case: Plaintiff, who was off from his regular job, was looking for temporary work; Benner & Fields, a construction company, was clearing land preliminary to constructing a building on it and needed workers to do the clearing; Manpower of Guilford County, Inc. was in the business of supplying temporary workers to many kinds of employers that needed them. For each temporary worker that Manpower supplies an employer it charges the employer an hourly rate depending upon the skills required for the job involved, establishes a lesser wage for the worker when his application is accepted, and when the job or week is over pays the employee direct, after withholding the taxes required by law. Upon inquiring at Manpower's office on 16 March 1981, plaintiff was told that a job clearing a construction site of trees was available, which he agreed to accept. His rate of pay was set at $ 4.00 an hour, but the hourly rate that Benner & Fields paid Manpower for this job was $ 6.25. Plaintiff [***3] filled out an employment application with Manpower, was told to report to J. C. Hunt, Benner & Fields' supervisor at the job site involved, and was given a slip of paper with the job site address and Hunt's name on it. Upon arriving at the job site plaintiff was put to work cutting down trees, and before the day was over a tree felled by a fellow employee struck and injured him. Benner & Fields paid Manpower $ 6.25 an hour for the hours that plaintiff worked that day and Manpower in turn paid plaintiff $ 4.00 an hour, less the withholding taxes.

When plaintiff's Workers' Compensation claim against both Manpower and Benner & Fields was heard, Deputy Commissioner Bryant concluded that when injured plaintiff was not an employee of Benner & Fields, but was an employee of Manpower, and awarded him disability benefits. Meanwhile, with the Commission's approval, plaintiff and Manpower's carrier entered into a lump sum settlement, which has been paid, and plaintiff is no longer interested in the case. Manpower appealed the determination that plaintiff was not also an employee of Benner & Fields; but the Full Commission affirmed the award in all respects, and Manpower again appealed.

COUNSEL: [***4] *No brief filed for plaintiff appellee*.

Tuggle, Duggins, Meschan & Elrod, by J. Reed Johnston, Jr., for defendant appellants Manpower of Guilford County, Inc. and The Home Insurance Company.

Shope, McNeil and Maddox, by E. Thomas Maddox, Jr., for defendant appellees Benner & Fields, Inc. and Michigan Mutual Insurance Company.

JUDGES: Eugene H. Phillips, Judge, wrote the opinion. Judges John Webb and Clifton E. Johnson concur.

OPINION BY: PHILLIPS

OPINION

[*410] [**691] The only question presented is whether plaintiff was employed solely by Manpower, as determined by the Industrial Commission, or was employed jointly by Manpower and Benner & Fields, as the appellants contend. We hold that plaintiff was employed both by Manpower and Benner & Fields and that both are therefore liable for the Workers' Compensation payments received by plaintiff. *Leggette v. McCotter*, 265 N.C. 617, 144 S.E. 2d 849 (1965).

The Commission's conclusion that plaintiff was not an employee of Benner & [**692] Fields was primarily based on the following finding of fact:

6. Although defendant-Manpower furnished no tools or materials, only Manpower could fire or hire the employees [***5] which they send to their customers. Because defendant-Manpower exercised ultimate control over the employees they sent to defendant-Benner & Fields, defendant-Manpower is singly liable for the injuries suffered by plaintiff in the course of his employment with Manpower.

Not only is this finding of fact not supported by competent evidence, but the evidence before the Commission indisputably established otherwise.

William Chambers, Manpower's Industrial Manager, testified that:

Manpower furnished no materials or tools at all for Mr. Henderson in connection with his work with Benner & Fields. Mr. Hunt had control over the manner and methods in which a particular job is done for a customer. When we get an order we are also told who the supervisor is that the men [*411] will be working for and the supervisor they are to report to. Once they get on the job they are under his supervisor [sic] one hundred percent. We furnish no supervision on jobs. This is customary and usual for Manpower. On this particular job on March 16, 1981 we were furnishing no supervision whatsoever to Mr. Henderson with respect to this particular job, nor did we furnish any tools or any materials.

[***6] . . .

Benner & Fields was not obligated to continue to use the services of Mr. Henderson for any period of time. Mr. Henderson was subject to discharge from working for Benner & Fields at the discretion of Benner & Fields. When a person such as Mr. Henderson came and applied for temporary help with Manpower, Manpower did not guarantee that he would be furnished with a job. Mr. Henderson was not paid any wages until he was assigned a job for a customer of Manpower.

* * *

When we send an employee out to work for a customer that employee works for the customer only as long as the customer needs him. It is the customer's needs that we are furnishing. In Mr. Henderson's case if after working for Benner & Fields for a short time they told they didn't think he could handle the job and they didn't believe they could use him for the rest of the day and he left Benner & Fields, he would still be employed by Manpower. As to whether only Manpower has the power to fire and hire the people that we send out to customers, that is true.

* * *

It was Benner & Fields' supervisor's responsibility to assign particular duties to Mr. Henderson for this job. The supervisor had supervision [***7] over the manner and method in which Mr. Henderson carried out his duties. Manpower did not benefit in any way from the activity or services that Mr. Henderson was carrying out on the job site at Benner & Fields other than the $ 6.25 an hour that was paid.

Irvin Angel, Benner & Fields' President, testified:

[*412] As to whether Benner & Fields would direct the method and manner in which Mr. Henderson performed the duties that he was doing, we would direct the work to be done. The manner in which he does would be his own skills. If the manner in which it was done was not satisfactory we couldn't keep him on the job. The manner and method in which Mr. Henderson, Mr. Carter and any other person that was sent over by Manpower did his work was under the supervision of Mr. Hunt. As to whether in Mr. Henderson's case if we were not satisfied with the manner in which he was doing the work or his ability to take directions, we would not keep him if he was unsatisfactory, because Manpower's responsibility was to furnish those people skilled. [**693] Benner & Fields was not obligated to keep any person on the job site sent over by Manpower if he was not satisfactory. By [***8] him being not satisfactory, that is a decision Benner & Fields would make.

* * *

If we were dissatisfied with one of Manpower's employees, we would call Manpower and tell them that he was not performing his duties satisfactorily and he would likely be replaced. As to whether Manpower or us would replace him, Manpower.

No evidence to the contrary was offered. In our judgment, the evidence presented establishes as a matter of law that plaintiff was the employee of both Manpower and Benner & Fields within the contemplation of the Workers' Compensation Act. It shows that: Cutting trees and clearing land, the work that injured plaintiff, was entirely the work of Benner & Fields. In doing that work, plaintiff was under the sole control and supervision of Benner & Fields, who not only controlled the details of that work, but had the right to discharge plaintiff from *that* work at will. Manpower had no control whatever over plaintiff while he was working for Benner & Fields, nor did it have any interest in controlling him during such time, since its business is hiring employees to others for their use, and it had hired plaintiff to Benner & Fields for them to use as they saw [***9] fit. The control that Manpower had over plaintiff was the power to assign him to an employer interested in renting his services, to establish his rate of pay on each job, and terminate his connection with Manpower when it saw fit.

[*413] That Benner & Fields had no power to terminate plaintiff's employment or arrangement with Manpower, which the Commission deemed decisive, is irrelevant to the case, in our opinion. The control that is relevant to the case was control over the tree cutting work and those that did it. If the Commission's conception to the contrary was legally correct, the loaned or borrowed servant rule would be unknown to the law, since [HN1]a borrower, from the nature of things, has only the power to terminate the loan and after terminating it has no control whatever over that which had been borrowed and returned. Yet, the courts have long recognized that a general employee of one can also be the special employee of another while doing the latter's work and under his control. 99 C.J.S. *Workmen's Compensation* § 47 (1958). And it goes without saying that if a loaned servant is the borrower's servant also when doing the borrower's work and under his control, [***10] a servant especially hired out for that very purpose is likewise. *Leggette v. McCotter*, 265 N.C. 617, 144 S.E. 2d 849 (1965). In that case, a front-end loader operator, who was in the general employment of a building supplies concern that occasionally rented heavy equipment and the operator to its customers, was held to also be the special employee of the building contractor, who rented both the machine and operator, directed the details of the work, and had the power to terminate the special work being done, but had no power to terminate the general overall employment of the operator.

[HN2] G.S. 97-2(2) defines an employee as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written. . . ." Nevertheless, it is fundamental that under some circumstances a person can be an employee of two different employers at the same time, in which event either employer or both may be liable for Workers' Compensation. *Leggette v. McCotter, supra.* The concept of joint employment in Workers' Compensation cases is explained in 1C, Larson, Workmen's Compensation Law, § 48.40 (1982) as follows:

Joint employment occurs [***11] when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the [*414] same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen's compensation.

[**694] In § 48.00 of the same volume, [HN3]the test for determining the liability of special employers in loaned employee cases is stated as follows:

When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if

(a) the employee has made a contract of hire, express or implied, with the special employer;

(b) the work being done is essentially that of the special employer; and

(c) the special employer has a right to control the details of the work.

When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.

The test stated was adopted by this Court in *Collins v. James Paul Edwards, Inc.*, 21 N.C. App. 455, 204 S.E. 2d 873, *cert. denied*, 285 N.C. 589, 206 [***12] S.E. 2d 862 (1974), and its three conditions are fully met by the facts of this case: (a) Although no express contract existed between plaintiff and Benner & Fields, an implied contract manifestly did, since they accepted plaintiff's work and were obligated to pay Manpower for it, and Manpower was obligated in turn to pay plaintiff; (b) plaintiff was doing Benner & Fields' work when injured; and (c) Benner & Fields had the right to and did control the details of that work.

Benner & Fields' contention that *Collins v. James Paul Edwards, Inc., supra*, requires a holding that it was not a special employer of plaintiff is mistaken. In that case the general employer was a grading contractor, the alleged special employer was a paving contractor, neither was engaged in the business of furnishing employees to the other or anyone else, the employee never left the control of the general employer, and it did not appear to the court's satisfaction that the employee had consented to the control of the paving contractor. The circumstances of this case, already stated, are materially different. Furthermore, since [*415] the dominant purpose of the Workers' Compensation Act is to protect [***13] and compensate employees injured on their jobs, employers in charge of jobs where work is actually done and injuries occur should not be absolved of liability because of bookkeeping practices of those who merely arrange for workers to report to others.

In conclusion, we hold that Benner & Fields was a special employer of plaintiff and is therefore liable equally with Manpower for compensating the plaintiff.

The award of the Industrial Commission is vacated and the matter remanded for the entry of an award in favor of the appellants in accord with this opinion.

Vacated and remanded.

Citation #10
15 OSHC 1635

LEXSEE

Positive
As of: Apr 26, 2012

LOOMIS CABINET COMPANY

OSHRC Docket No. 88-2012

Occupational Safety And Health Review Commission

1992 OSAHRC LEXIS 65; 15 OSHC (BNA) 1635; 1992 OSHD (CCH) P29,689

May 20, 1992

CORE TERMS: partner, cabinet, partnership, hiring, abate, workplace, machine, customers, shop, guy, hired, manufacture, employment relationship, other-than-serious, inspection, abatement, workshop, occupational safety,

common law, protective, gravity, hazard, repeat, financial services, specifications, negotiations, accounting, basically, suppliers, firing

JUDGES: [*1]

Before FOULKE, Chairman; WISEMAN and MONTOYA, Commissioners.

OPINION:

DECISION

BY THE COMMISSION:

The Secretary of Labor ("the Secretary") through the Occupational Safety and Health Administration ("OSHA") issued to Loomis Cabinet Company ("Loomis") a notification of failure to abate numerous violations of the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 ("the Act"), as well as citations for repeat and other-than-serious violations of the Act. n1 The Secretary proposed penalties amounting to $ 43,900. Loomis stipulated to the existence of the violations. However, Loomis contended that it was improperly cited because it was not an employer within the meaning of section 3(5) of the Act. n2 At the hearing, Loomis claimed that the persons exposed to the violations were former employees of Loomis who had become partners in the Eastview Cabinet Company ("Eastview"), with which Loomis had a contractual relationship. n3 Review Commission Administrative Law Judge Irving Sommer found that no partnership existed and that the alleged partners were Loomis employees and affirmed both the citations and the proposed penalty. On review, Loomis [*2] renews the argument that the workers at issue were not employees of Loomis, and that the penalty assessed by the judge was not appropriate. We conclude that an employment relationship did in fact exist between Loomis and the workers at issue, and we affirm the assessed penalty.

n1 The notification of failure to abate involved 15 standards: 1.) 29 C.F.R. § 1910.37(k)(2) (obstructed exits); 2.) 29 C.F.R. § 1910.37(q)(1) (unmarked exits); 3.) 29 C.F.R. § 1910.94(c)(2) (failure to meet spray-finishing area requirements); 4.) 29 C.F.R. § 1910.133(a)(1) (failure to wear protective eye equipment); 5.) 29 C.F.R. § 213(b)(3) (six power woodworking machines not provided with switches to prevent restarts upon restoration of power after power failure); 6.) 29 C.F.R. § 1910.213(d)(1) and (h)(1) (unguarded power saw); 7.) 29 C.F.R. § 1910.213(h)(4) (power saw not provided with automatic return); 8.) 29 C.F.R. § 1903.2(a)(1) (failure to post OSHA notice); 9.) 29 C.F.R. § 1904.2(a) (failure to maintain a log of injuries/illnesses); 10.) 29 C.F.R. § 1910.141(a)(3)(i) (unclean toilet facility); 11.) 29 C.F.R. § 1910.213(p)(4) (unguarded belt sander); 12.) 29 C.F.R. § 1910.242(b) (compressed air in excess of 30 psi); 13.) 29 C.F.R. § 1910.1200(e)(1) (no hazard communication program); 14.) 29 C.F.R. § 1910.1200(g)(1) (no Material Data Sheet for adhesive); 15.) 29 C.F.R. § 1910.1200(h) (training and information on hazardous chemicals not provided).

The repeat citation alleged violations of 1.) 29 C.F.R. § 1910.22(a)(1) (working area of trim saw cluttered with debris) and 2.) 29 C.F.R. § 1910.305(b)(2) (no cover for electrical receptacle box). The other-than-serious citation alleged a violation of 29 C.F.R. § 1903.16(a) (failure to post citations of violations).
[*3]

n2 Section 3(5) of the Act defines "employer" as "a person engaged in a business affecting commerce who has employees." Section 3(6) of the Act defines "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce."

n3 In its brief, Loomis states that in August, 1989, the Eastview entity was replaced by an entity known as the "Empire Cabinet Company." Loomis claims that its business relationship with Empire is essentially the same as the Eastview relationship for purposes of this case.

I. Background

On January 5, 1988, OSHA inspected the Loomis Cabinet workshop located in North Highlands, California. n4 On March 1, 1988, OSHA issued one citation alleging nine serious violations, and a second citation alleging nine other-than-serious violations, with abatement dates ranging from March 3 through March 31, 1988. These citations were not

contested.

n4 This case arose during the period from 1987 to 1989 when California's Occupational Safety and Health Administration (CAL-OSHA) was not in operation. Future enforcement of the Act at Loomis would be left to CAL-OSHA.

[*4]

Loomis represents that on March 1, the day the citation was issued, its employees stopped working for Loomis by forming the Eastview Cabinet Company partnership, which later entered into a contract to manufacture cabinets exclusively for Loomis. n5 Michael Loomis, the sole owner of the Loomis Cabinet Company, testified that the partnership was formed so that Loomis and the workers "could make more money" and "wouldn't have to be held hostage by the [workmen's compensation insurance] and the other restraints of government agencies." n6 The partnership contract, which was not formalized until September 1, 1988, provided that the members of Eastview would manufacture wood cabinets under the direction of Loomis Cabinet in exchange for 75 percent of the net profit from the cabinets' sale. n7

n5 Mr. Loomis testified that some of the workers, but not the partnership, do "a little business on the side," but that the work could not be done on business hours because Loomis has an exclusive contract with the partnership.

n6 When Mr. Loomis was questioned about whether the partnership was formed to "get out from under federal OSHA", he responded that it "didn't even enter into any reason why we did it," although he did admit that the members were aware of the first OSHA inspection and that some of the senior people knew that penalties had been assessed.

[*5]

n7 There is no documentary evidence detailing the nature of Eastview as it existed before September 1, 1988, the date an "Amended Partnership Agreement for Eastview Cabinet Company A California Partnership" was executed.

On or about July 1, 1988, OSHA attempted a second inspection at Loomis' place of business. At first, Loomis objected and refused entry on the grounds that it had no employees and was therefore not subject to OSHA jurisdiction. However, it later consented to the inspection. Following the inspection, OSHA issued a Notification of Failure to Abate Alleged Violations, a citation for repeat violations, and a citation for an other-than-serious violation. Loomis contested the citations by letter, dated August 24, 1988, alleging that it was not an employer.

On October 1, 1988, Loomis and Eastview further refined their agreement in a "Management Services Contract and Contract to Provide Manufacturing Services." According to this agreement, Loomis conducts all contract negotiations with suppliers and customers, provides the designs and specifications for the cabinets, schedules the work [*6] with the customers, assists the Eastview Management Committee in supervision, manufacture, installation, and quality control, and performs all accounting, administrative, and financial services. Loomis also provides Eastview with tools, tool maintenance, the shop itself, and all materials and supplies. In return, 75 percent of Loomis' profits go to Eastview, while the remaining 25 percent stays with Loomis. The profits destined for Eastview are then divided again among the partners, based according to the partners' respective skill level, as determined by the Eastview Management Committee. n8

n8 The Amended Partnership Agreement reflects the cash contribution each partner made in an amount proportional to his ownership interest. The total capital contribution collected from all the partners amounted to $ 1000.

II. Judge's Decision

On August 16, 1989, the judge issued a decision affirming the citations in this case. Judge Sommer applied the

"economic realities test," first articulated and applied by the Commission [*7] in *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702, 1703, 1978 CCH OSHD P22,829, pp. 27,600-01 (No. 14801, 1978), and more recently in *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2158, 1989 CCH OSHD P28,504, p. 37,780 (No. 87-214, consolidated, 1989). The judge found that the record establishes that "there is no partnership among Eastview 'partners' nor between Loomis Cabinet Company and its employees," and that "there existed an employer-employee relationship between Eastview and Loomis despite its partnership form." Accordingly, the judge held that OSHA did have jurisdiction over Loomis' workplace. The judge noted that Loomis had "essentially put all its eggs in one basket in arguing that OSHA was without jurisdiction" because "Loomis otherwise made minimal attempt[s] to demonstrate that it should prevail on the basis of any affirmative defenses." Judge Sommer also noted that "since Loomis submitted little or no evidence, many of the violations must be affirmed on the basis of Loomis' own admissions as outlined in the [s]tipulation . . . and the record evidence." The judge held that the record established that Loomis violated all the cited [*8] standards "by a preponderance of the evidence."

III. Discussion

A. Whether the workers are employees of Loomis

i.

To determine whether an employment relationship exists, the Commission has applied an "economic realities test." The test emphasizes the substance over the form of the relationship between the alleged employer and the workers. The Commission has considered a number of factors when making such a determination, including the following:

1) Whom do the workers consider their employer?
2) Who pays the workers' wages?
3) Who has the responsibility to control the workers?
4) Does the alleged employer have the power to control the workers?
5) Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?
6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?
7) How are the workers' wages established?

Van Buren-Madawaska, 13 BNA OSHC at 2158, 1989 CCH OSHD at p. 37,780 (quoting *Griffin & Brand,* 6 BNA OSHC at 1703, 1978 CCH OSHD at pp. 27,600-01).

The Secretary has directed our attention to *Nationwide Mutual Insurance Co. v. Darden,* 60 U.S.L.W. 4242, 4243 [*9] (U.S. March 24, 1992). In *Darden,* the Supreme Court held that the term "employee," in a federal statute, should be interpreted under common law principles unless Congress clearly indicated otherwise. The Court quoted the following language from *Community for Creative Non-Violence v. Reid,* 490 U.S. 730 (1989), discussing the common law interpretation of what constitutes an "employee" where the meaning of the term under the Copyright Act was at issue:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether [*10] the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

490 U.S. at 751-752 (footnotes omitted).

We note that many of the factors in the Commission's economic realities test appear in the *Darden* test as well. In determining whether there is an employment relationship for purposes of the Act, the Commission has primarily relied upon its determination of "who has control over the work environment such that abatement of hazards can be obtained." *Van Buren-Madawaska,* 13 BNA OSHC at 2159, 1989 CCH OSHD at p. 37,781 (quoting *MLB Indus.*, 12 BNA OSHC 1525, 1527, 1984-85 CCH OSHD P27,408 at p. 35,510 (No. 83-231, 1985)). In *Darden,* the Supreme Court primarily relies upon "the hiring party's right to control the manner and means by which the product is accomplished." *Darden,* 60 U.S.L.W. at 4243 (quoting *Reid,* 490 U.S. at 751). Thus, the inquiry central to both tests is the question of whether the

alleged employer controls the workplace. n9

n9 Although the Secretary brought *Darden* to our attention, neither party has briefed its applicability to the facts of this case. Without expressly finding *Darden* applicable, we conclude that the result would be the same under either test.

[*11]

Loomis argues that the responsibility of controlling the workers had passed to the workers themselves or to Mr. Do, the chief partner. However, as noted above, Loomis conducts all contract negotiations with suppliers and customers, provides the designs and specifications for the cabinets, and schedules the work with the customers. Loomis also controls pricing, choice of materials, and marketing. In addition, it provides accounting, administrative, and financial services. In contrast, the workers provided only their labor. Eastview did no advertising or soliciting, and made minimal effort to gain outside contracts. The Eastview partners worked exclusively for Loomis and were not allowed to work for other cabinet shops.

Moreover, Loomis exerted considerable control over the workshop with regard to abatement of hazardous conditions. Loomis owned all the equipment in the shop. Abatement of almost all the violations alleged in the citations would have involved either an adjustment to a machine owned by Loomis, the wearing of personal protective equipment to avoid a hazard on a machine owned by Loomis, or the modification of some other condition within Loomis' control.

The evidence further [*12] demonstrated the involvement of Mr. Loomis in hiring and firing the workers. The testimony established that "nine times out of ten," the partnership gets new people when the current workers bring in acquaintances. However, if the workers do not know anybody to fill a particular job position, they ask Mr. Loomis to put an ad in the paper. Mr. Loomis handles the phone calls and conducts "a screening interview and . . . narrow[s] it down for them." After Mr. Loomis' screening, the partners interview the potential workers themselves. Mr. Do testified that Mr. Loomis sometimes told him when to hire new people to complete a job. Mr. Loomis testified that he would tell Mr. Do if something happened that warranted firing an employee.

Loomis retained the power to unilaterally change conditions in the workshop. Mr. Loomis testified that he purchased a new lacquer spray machine for the workers to use. Although the workers did not like using the machine because it slowed them down, Mr. Loomis stated that he told the workers that they had to use the machine to make their product more competitive. Mr. Loomis also purchased a wide belt sander. He testified that the employees did not argue over [*13] its use because "it made everybody more money." In addition, Mr. Loomis recommended workloads and encouraged the workers to work more hours in order to meet production goals.

Also relevant in determining whether an employment relationship exists is the way in which the workers' wages were established. Mr. Loomis devised the partner level system of payment, which was "administered by his mother who is the bookkeeper for both Loomis and Eastview." n10 Mr. Loomis "deducts all rent, insurance payments and then issues Eastview their allotment" for distribution to the partners according to the partner level plan. Although it could be argued that Mr. Loomis merely administered a pay scheme set up by the partnership, the only change in the way the workers are paid under the partnership is that they now vote on each other's pay increases.

n10 When questioned on how raises are given, Mr. Loomis testified as follows:

Well, the contract's up at the end of the year. See, if you, I know they're going to try to dig into my 25 percent. So I'm going to have to guard against that. But the guys, you know, they probably will have to negotiate with me, which I'm not going to budge on.

But then they can negotiate with the rest of them about, because basically, what happens is that if there's a guy that's level two and he wants to be level three, the guys in four, five, six and seven got to give him some of their money. And basically, they, they don't know this, I'm not going to let them know, is that levels one through four could really, they could gang up on the five's, six's and seven's and out vote them and take a bunch of their money.

[*14]

ii.

Based on our consideration of these factors, we conclude that the workers in question were employees of Loomis, and not merely partners in a separate business entity that has an independent contractual relationship with Loomis. Loomis argues that it ceded to the partners of Eastview all the powers and responsibilities that made them employees of Loomis. However, we conclude that the record shows that Loomis controlled the cited workplace and the workers there. It is Loomis that conducted contract negotiations with suppliers and customers, provided the designs and specifications of the cabinets, scheduled the work with the customers, and controlled the pricing, choice of materials, and marketing. Loomis owned the workshop and all the equipment, and made unilateral decisions about the purchase of new equipment. Mr. Loomis participated in hiring and firing workers and drafted the partnership agreement. Loomis was also responsible for all accounting, administrative, and financial services. All of these factors, taken together, support our finding that the Loomis Cabinet Company was an employer within the meaning of the Act.

B. Penalty

i.

In determining an appropriate penalty, [*15] in accordance with section 17(j) of the Act, 29 U.S.C. § 666(j), we consider the size of the business, the gravity of the violation, the good faith of the employer, and the history of previous violations. Loomis' size, the gravity of the violations, and its history of previous violations are not in dispute. Loomis is a small company, but it has been cited for repeated violations of the Act. Loomis failed to abate its violations of 15 standards, (*see* note 1, *supra*), including the failure to guard such equipment as power saws and belt sanders, and the workers' failure to wear protective eye equipment. Its failure to abate these violations could result in serious bodily harm to the workers. At issue is whether Loomis exhibited good faith.

Loomis argues that it believed in good faith that it was no longer subject to OSHA jurisdiction. Loomis also claims that OSHA's penalty criteria does "not take into account the legal, economic, and practical realities of [Loomis'] business." Loomis argues that the penalties themselves were not appropriate because the worker's "own experience, common sense, desire to avoid injury, and business judgment allowed them to [*16] determine 'reasonably necessary or appropriate' safety standards for themselves, as such are contemplated by . . . the Act." Loomis claims that it was improperly cited because its workers have "15 years experience in the cabinet manufacture business" and that "Complainant's inspectors had no such experience nor any appreciation or understanding of the economic and practical realities of the cabinet manufacture business" and that the inspectors "had no experience with the tools and equipment used in the business." Loomis further argues that its workers' "freedom of choice in these matters should be respected by OSHA."

Loomis also argues that "Complainant's standards are not necessarily correct and fair just because they are Complainant's; Respondent and other reasonable experts can differ as to reasonable and proper standards for workplace safety in a production cabinet shop." Loomis claims that its "'contempt' was not for true workplace safety, but for the paternalistic, arrogant, and self-righteous approach which Complainant has taken in imposing its standards in this matter. . . ."

The Secretary challenges Loomis' good faith argument. The Secretary argues that "there is an obvious [*17] difference between a good faith belief that your operations are safe and a good faith belief that you have cleverly avoided the reach of the law by forming paper business entities." The Secretary further argues that Mr. Loomis did not exhibit good faith because he "was very candid in expressing his contempt for the requirements for safety devices." The Secretary relies on Mr. Loomis' testimony that if the employees wanted safety improvements made to the radial arm saw, he would make the employees pay for it. In addition, she notes that when Mr. Loomis was asked whether the workers have safety meetings, he replied, "No, it's dumb . . . ." The Secretary also points to Mr. Loomis' testimony of safety practices among cabinet makers, which he described as follows:

A. All the shops are set up exactly like mine. They hear the OSHA guy comes in, what happens, they stall the guy in the office and the foreman goes out there and tells everybody, put all of the guards on. And the guy comes out and inspects, he leaves, everybody rips everything off and sticks in a safe place so the next time he comes in. See, it's a joke.

Q. Is this primarily for the table saws?

A. Yeah. Basically, [*18] the table saws. That's the biggest thing. Maybe the safeties on the nail guns, but --

Q. Okay.

A. And they probably all reach for the bin where there's, you know, underneath this dusty table somewhere where the safety glasses are. Everybody's walking around with all this dust all over their lenses.

ii.

The test of good faith is an objective one, i.e. was the employer's belief concerning a factual matter or concerning the interpretation of a standard reasonable under the circumstances. *Mel Jarvis Constr. Co., Inc.,* 10 BNA OSHC 1052, 1053 (No. 77-2100, 1981). Under these circumstances, we cannot say that Loomis' beliefs regarding its duty to comply with the Act were reasonable. Its argument, that it did not need to comply with the standards because its workers were experienced, has no merit. "Employers are required to provide to all their employees, experienced and inexperienced alike, the protection that occupational safety and health standards are designed to accord to them." *C. Kaufman, Inc.,* 6 BNA OSHC 1295, 1299, 1977-78 CCH OSHD P22,481, p. 27,101 (No. 14249, 1978). Nor can Loomis choose not to follow the Secretary's standards because [*19] it "differ[s] as to reasonable and proper standards for workplace safety in a production cabinet shop." This contention only challenges the wisdom of the standards. It is well settled that the Commission lacks the power to invalidate a standard on such a ground. *Van Raalte Co., Inc.,* 4 BNA OSHC 1151, 1152, 1975-76 CCH OSHD P20,633, p. 24,698 (No. 5007, 1976). As long as a standard is within the Secretary's granted power, issued pursuant to proper procedure, and reasonable, we cannot question it except for unenforceable vagueness. *E.g., The Budd Co.,* 1 BNA OSHC 1548, 1551, 1973-74 CCH OSHD P17,387, p.21,916 (Nos. 199 & 215, 1974), *aff'd on other grounds,* 513 F.2d 201 (3d Cir. 1975). Loomis' failure to abate the violations cited in March 1987 in the belief that the partnership agreement put it out of the reach of the Act also demonstrates something less than good faith. Our impression of Loomis' attitude is reinforced by its arguments, criticizing, *inter alia,* the "paternalistic, arrogant, and self-righteous approach which Complainant has taken in imposing its standards in this matter . . . ."

We therefore conclude that Loomis' [*20] size, its history of previous violations, the gravity of the violations and failures to abate at issue here, and its lack of good faith do not warrant any reduction in the $ 43,900 penalty proposed by the Secretary.

IV. Order

Accordingly, we find that the workers in question were employees of Loomis under the Act. We assess a penalty of $ 43,900 for the citations and instances of failure to abate set forth in note 1, *supra.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPartnership AgreementsLabor & Employment LawEmployment RelationshipsEmployment at WillEmployersLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsJurisdiction

Citation #11
2010 PA Super 72

LEXSEE

Caution
As of: Apr 26, 2012

DIANE BLACK, Appellant v. LABOR READY, INC., WILLIAMSPORT STEEL CONTAINER CORP. and RHEEM MANUFACTURING COMPANY, INC., Appellees

No. 312 MDA 2009

SUPERIOR COURT OF PENNSYLVANIA

2010 PA Super 72; 995 A.2d 875; 2010 Pa. Super. LEXIS 329

April 26, 2010, Filed

PRIOR HISTORY: [***1]
Appeal from the Order of February 9, 2009, in the Court of Common Pleas of Lycoming County, Civil Division at No. 06-01679.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant worker challenged the judgment of the Court of Common Pleas of Lycoming County, Civil Division (Pennsylvania), which granted summary judgment in favor of appellee steel container corporation. The worker had brought suit against the corporation asserting counts of strict liability, negligence, and indemnification.

OVERVIEW: The worker was employed by a placement company and was placed in a position with the corporation. While operating machinery, the worker's hand was injured and required amputation. Subsequently, the worker filed a workers' compensation case wherein it was determined that the placement company, not the corporation, was the worker's employer. In granting the corporation's motion for summary judgment, the trial court had agreed with the corporation that it was immune from suit under Pennsylvania Workers' Compensation Act since, at the time of the accident, it employed the worker. The court held that the corporation was judicially estopped from claiming to be the worker's employer since that issue was determined in the workers' compensation proceeding.

OUTCOME: The court vacated the judgment and reversed the order granting summary judgment in favor of the corporation. The court remanded the case to the trial court for further proceedings.

CORE TERMS: summary judgment, workers' compensation, estopped, order granting, immunity, compensation payments, compensation proceedings, citations omitted, judicial estoppel, compensable, stance, average weekly wage, collaterally estopped, succeeding, notice, moving party, benefited, genuine, immune, punch press, new matter, equitably, factory, vacate, temp

LexisNexis(R) Headnotes

Workers' Compensation & SSDI > Remedies Under Other Laws > Exclusivity > Employees & Employers
[HN1]Where an employee's injury is compensable under the Pennsylvania Workers' Compensation Act, the compensation provided by the statute is the employee's exclusive remedy against his or her employer. Thus, an injured employee cannot maintain a tort action against his or her employer if the injury is compensable under the provisions of the Act.

Civil Procedure > Summary Judgment > Evidence
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Legal Entitlement
[HN2]The standards which govern summary judgment are well settled. When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. The court may grant summary judgment only when the right to such a judgment is clear and free from doubt.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
[HN3]An appellate court may reverse the granting of a motion for summary judgment if there has been an error of law or an abuse of discretion.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel
[HN4]The Pennsylvania Supreme Court has held that, as a general rule, a party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained. Accordingly, judicial estoppel is properly applied only if the court concludes the following: that the appellant assumed an inconsistent position in an earlier action; and that the appellant's contention was successfully maintained in that action.

JUDGES: BEFORE: FORD ELLIOTT, P.J., FREEDBERG and COLVILLE * , JJ. OPINION BY COLVILLE, J.

* Retired Senior Judge assigned to the Superior Court.

OPINION BY: COLVILLE

OPINION

[**875] OPINION BY COLVILLE, J.:

[*P1] This is an appeal from an order granting summary judgment. More specifically, Appellant challenges the trial court's decision to grant Appellee [**876] Williamsport Steel Container Corporation's ("Appellee") motion for summary judgment. We vacate the judgment [1] and reverse the order granting summary judgment in favor of Appellee.

1 After the trial court entered its order granting summary judgment, Appellant filed a praecipe for the entry of judgment, and judgment was entered.

[*P2] The background underlying this matter can be summarized in the following manner. On August 18, 2004, Appellant sought employment through Labor Ready, Inc. ("Labor Ready"). On August 18th and 19th of 2004, Labor Ready sent Appellant to work at Appellee's factory. In the process of operating a punch press at the factory, the machine descended on Appellant's right hand, resulting in amputation of the hand.

[*P3] On September 2, 2004, Labor Ready [***2] issued a "Notice of Temporary Compensation Payable." In this notice, Labor Ready identified itself as Appellant's employer and determined Appellant's weekly workers' compensation rate to be $ 108.00. This amount was based upon an average weekly wage of $ 120.00. In December of 2004, Appellant filed a petition to review the compensation benefits. Appellant asked the Workers' Compensation Judge ("WCJ") to determine that the average weekly wage set by Labor Ready was incorrect.

[*P4] A little over a week later, Appellant filed a claim petition for workers' compensation wherein Appellant identified Appellee as her employer. Appellee filed an answer to the claim petition. In this answer, Appellee specifically denied that it was Appellant's employer at the time of the accident. According to the answer, Appellant was an employee of Labor Ready when the accident occurred.

[*P5] A hearing was held before the WCJ on June 22, 2005. As to this hearing, for present purposes, it is sufficient to note that, after an off-the-record discussion, the WCJ announced that the parties had reached a stipulation. According to the WCJ, the parties stipulated that Appellant's average weekly wage was $ 240.00. Implicit in [***3] the WCJ's pronouncement was that the parties agreed that Labor Ready was Appellant's employer. [2] Based upon these agreements, Appellant further stipulated that she would withdraw her claim petition wherein she named Appellee as her employer. The WCJ later issued a decision. This decision essentially memorialized the parties' stipulations.

2 The parties do not dispute that Labor Ready is responsible for providing Appellant with workers' compensation payments.

[*P6] On September 22, 2006, Appellant filed a complaint, and later an amended complaint, against Labor Ready, Appellee, and Rheem Manufacturing Corporation, Inc. ("Rheem"). With regard to Appellee, Appellant plead counts of strict liability, negligence, and indemnification.

[*P7] Appellee filed an answer and new matter. In the new matter, Appellee, *inter alia,* reserved all defenses

available to them under the Pennsylvania Workers' Compensation Act ("Act"). Appellee claimed that, at the time of the accident, it employed Appellant. According to Appellee, Appellant's status as its employee barred Appellant's action against Appellee. [3]

3 As this Court has stated:

> [HN1]Where an employee's injury is compensable under the Act, the compensation provided by [***4] the statute is the employee's exclusive remedy against his or her employer. Thus, an injured employee cannot maintain a tort action against his or her employer if the injury is compensable under the provisions of the Act.

Albright v. Fagan, 448 Pa. Super. 395, 671 A.2d 760, 762 (Pa. Super. 1996) (citations omitted). Here, it is undisputed that Appellant's injury is compensable under the Act.

[*P8] [**877] After the parties filed various other documents, the trial court granted a preliminary objection filed by Labor Ready, which resulted in Appellant's amended complaint being dismissed as to Labor Ready. The court directed Appellant to arbitrate its claims against Labor Ready. According to Appellant, the arbitrator ruled against her on the basis of employer immunity.

[*P9] In any event, the two remaining defendants, *i.e.,* Appellee and Rheem, filed motions for summary judgment. As to Appellee's motion, it claimed, in pertinent part:

> [Appellant] is a borrowed employee at [Appellee] and, therefore, [Appellant's] complaint against [Appellee] must be dismissed because [Appellee] is protected by the workers' compensation exclusivity provision.

Appellee's Motion for Summary Judgment, 12/15/08, at P11.

[*P10] In her answer to this motion, [***5] Appellant contended that Appellee is judicially, equitably, and collaterally estopped from claiming that she was Appellee's employee for workers' compensation purposes. In support of this contention, Appellant cited the WCJ's decision.

[*P11] The trial court disagreed with Appellant, asserting, in part:

> [The WCJ's] adjudication does not collaterally estop [Appellee] from contending to be [Appellant's] employer as the adjudication determined Labor Ready to be [Appellant's] employer *for purposes of worker's compensation payments.* That is an entirely different question from that of who was her employer for purposes of civil liability.

Trial Court Opinion and Order, 2/9/09, at 1 (emphasis in original). The court further determined that the evidence clearly shows that Appellee was Appellant's employer and that Appellee, therefore, is immune from suit. Consequently, the trial court granted Appellee's motion for summary judgment. On the same day, the court granted Rheem's motion for summary judgment as well. Appellant timely filed a notice of appeal.

[*P12] In her brief to this Court, Appellant asks us to consider the following questions:

> 1. As a result of the proceedings before and adjudication by a workers' [***6] compensation judge, was [Appellee] judicially estopped from succeeding on its claim of workers' compensation immunity?
>
> 2. As a result of the proceedings before and adjudication by a workers' compensation judge, was [Appellee] collaterally estopped from succeeding on its claim of workers' compensation immunity?
>
> 3. As a result of the proceedings before and adjudication by a workers' compensation judge, was [Appellee] equitably estopped from succeeding on its claim of workers' compensation immunity?

Appellant's Brief at 4.

[*P13] Stated in general terms, Appellant claims the trial court erred by granting summary judgment in favor of Appellee. We review such matters with the following principles of law in mind:

> [HN2]The standards which govern summary judgment are well settled. When a party seeks summary judgment, a court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. A motion for summary judgment is based on an evidentiary record that entitles the [**878] moving party to a judgment as a matter of law. In considering the merits of a motion for summary judgment, a court views [***7] the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the court may grant summary judgment only when the right to such a judgment is clear and free from doubt. [HN3]An appellate court may reverse the granting of a motion for summary judgment if there has been an error of law or an abuse of discretion. . . .

Swords v. Harleysville Insurance Companies, 584 Pa. 382, 883 A.2d 562, 566-67 (Pa. 2005) (citations omitted).

[*P14] Under Appellant's first issue, [4] she highlights the fact that, in the workers' compensation proceedings, Appellee filed an answer wherein it repeatedly denied being Appellant's employer and asserted that Labor Ready was Appellant's employer. Appellant claims that this position is inconsistent with the position that Appellee has taken in this case, namely, that Appellee was, in fact, Appellant's employer at the time of the accident. Appellant further claims that Appellee benefited from the stance it took in the workers' compensation proceedings. In this regard, Appellant states that Appellee "benefited from an adjudication of Labor Ready's responsibility for workers' [***8] compensation payments[.]" Appellant's Brief at 21. Appellant, therefore, claims that, for purposes of this case, Appellee is judicially estopped from claiming the status of an employer immune from liability under the Act. We agree with Appellant.

> [HN4]Our Supreme Court has held that "[a]s a general rule, a party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained." ***In re Adoption of S.A.J.,*** 575 Pa. 624, 631, 838 A.2d 616, 620 (2003) (citation omitted). Accordingly, judicial estoppel is properly applied only if the court concludes the following: (1) that the appellant assumed an inconsistent position in an earlier action; *and* (2) that the appellant's contention was "successfully maintained" in that action. ***Id.*** at 632, 838 A.2d at 621.<FN8>
>
> FN8. Our Supreme Court has not definitively established whether the second element (successful maintenance) is strictly necessary to implicate judicial estoppel or is merely a factor favoring the application. ***See*** ***S.A.J.,*** *supra* at 631 n. 3, 838 A.2d at 620 n. 3.

Vargo v. Schwartz, 2007 PA Super 402, 940 A.2d 459, 470 (Pa. Super. 2007) (emphasis in original).

4 Under [***9] her questions presented for appeal, Appellant presents her first issue as whether Appellee is judicially estopped from claiming Appellant was its employee at the time of the accident. Yet, in the argument section of her brief, Appellant addresses this issue after she argues her claim that Appellee is collaterally estopped from claiming Appellant was its employee at the time of the accident. ***See*** Appellant's Brief at 20-23. For purposes of this memorandum, we will treat Appellant's judicial estoppel issue to be her first issue.

[*P15] In its answer to Appellant's claim petition, Appellee stated, in relevant part:

> 4. Acknowledged that there was a punch press injury while [Appellant] was employed by Labor Ready, a temp service.
>
> 5. Specifically denied that [Appellant] was an employee of [Appellee]. . . .
>
> 17. [Appellant] was an employee of Labor Ready, and not an employee of [Appellee].

18. [Appellant] was not in the scope of employment with [Appellee] at the time of the accident.

[**879] 19. [Appellant] was not in the course of employment with [Appellee] at the time of the accident.

Appellant's Brief in Opposition to Appellee's Motion for Summary Judgment, 1/26/09, Exhibit D.

[*P16] As the above-quoted assertions [***10] make obvious, Appellee's position in the workers' compensation action was that Labor Ready, not Appellee, was Appellant's employer at the time of the accident. In the current action, Appellee has adopted the stance that it was Appellant's employer at the time of the accident. Appellee's current stance clearly is inconsistent with the position it took in the workers' compensation action.

[*P17] We further conclude that, in the workers' compensation action, Appellee successfully maintained its contention that it was not Appellant's employer when the accident occurred. Appellee fully participated in the discussions that lead to the parties' stipulations at the workers' compensation proceedings. These stipulations resulted in Labor Ready, not Appellee, being held responsible for paying Appellant's workers' compensation. Indeed, the stipulations resulted in Appellant withdrawing its claim petition against Appellee. For these reasons, we conclude that Appellee was judicially estopped in the present case from claiming it was Appellant's employer at the time of the accident. [5]

5 Due to the manner in which we dispose of Appellant's first issue, we need not address the merits of her other two issues.

[*P18] [***11] Accordingly, we find that the trial court erred in granting Appellee's motion for summary judgment. We, therefore, vacate the judgment, reverse the order granting summary judgment in favor of Appellee, and remand for further proceedings.

[*P19] Judgment vacated. Order granting Appellee's motion for summary judgment reversed. Case remanded. Jurisdiction relinquished.