

LIABILITY RISKS ASSOCIATED WITH “BORROWED” EMPLOYEES

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I. INTRODUCTION

A. Scope and intent of this article.

Many of us who practice “insurance defense” law have only a passing familiarity with the state’s workers’ compensation laws. In most cases, all we need to know is that where an employee is injured on the job his sole remedy is that provided under the workers compensation laws and he cannot bring a separate common law tort action against his employer. In the rare cases where an employee brings such an action, and we are assigned the case, we simply cite the exclusive remedy provision of the Workers’ Compensation Act and the common law action is dismissed.

But what if the injured person is paid and receives his health insurance and other benefits from one company but is actually performing work for another. Which company is his employer for workers’ compensation purposes? Which company is protected from common law tort liability? And what is the effect if one of the companies has workers compensation insurance and the other does not? The goal of this paper is to explore these issues in general and also as they may affect the liability of local governmental entities.

B. A note of caution.

The authors of the paper are not experts on the Texas’ workers compensation laws and the purpose of this paper is not to provide a comprehensive discussion of those laws. Instead those laws are examined only to the extent they affect the potential liability of employers for common law claims asserted by employees.

Additionally, this paper is not intended as legal advice applicable to a specific person or situation. Rather, it is offered to provide general background information that may be useful in identifying issues for further analysis.

C. The employment relationship.

The determination of whether an employment relationship exists between a worker and the one receiving the worker’s services is important to determining the potential liability of the receiver of

the services in the event the worker asserts a claim for on-the-job injuries. If the worker is determined to be an “employee” of the service receiver, the worker may be limited to the recovery of benefits provided under the employer’s workers compensation insurance and barred from pursuing a common law claim for damages.

II. EXCLUSIVE REMEDY DEFENSE.

A. Generally.

The Texas Workers’ Compensation Act¹ sets up a system in which employers may elect to buy workers compensation insurance coverage that will provide lost income and medical care benefits to their employees if they are injured on the job. As a general rule, if an employer buys the specified insurance coverage, it will have no liability for the employee’s on-the-job injuries.²

The Act establishes an “exclusive remedy” defense for employers who provide workers compensation insurance coverage.

(a) 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 employee of the employer for the death of or a work-related injury sustained by the employee.

TEX. LAB. CODE §408.001(a) (Vernon 2006).

The exclusive remedy provision is an affirmative defense, *Western Steel Co. v. Altenburg*, 206 S.W.3d 121, 121 (Tex. 2006)(*per curiam*). In order to establish that the exclusive remedy provision precludes recovery, the employer must prove two things: (1) that the defendant was the plaintiff’s

¹ TEX. LAB. CODE title 5.

² One exception to this general rule is the right of an employee to elect to retain her common law remedies in lieu of the benefits of workers compensation insurance. Tex. Lab. Code § 406.034. An employee must make this election, in writing, within 5 days after the date she is hired or the date her employer obtains insurance coverage. Any common law claim the employee makes will be subject to the traditional common law defenses.

employer; and (2) that the defendant was covered by a workers' compensation insurance policy. *Western Steel Co. v. Altenburg*, 206 S.W.3d 121, 123 (Tex. 2006)(*per curiam*); *Garza v. Exel Logistics, Inc.*, 161 S.W. 3d 475, 475-77 (Tex. 2005).

If a private employer elects not to buy workers compensation insurance coverage, an injured employee can bring a common law tort action against the employer and the employer will not be able to rely on the traditional common law defenses of contributory negligence, assumed risk, or negligence of a fellow employee.

Governmental entities, including cities, are required to provide workers compensation benefits to their employees through self insurance, purchase of a private policy, or participation in a risk pool. TEX. LAB. CODE § 504.011. They also have the option of extending that coverage to volunteers. *Id.*, § 504.012. A governmental entity that complies with its legal obligation to purchase workers' compensation insurance for its employees is entitled to the protection of the exclusive remedy defense.³

The Workers' Compensation Act permits the beneficiaries of a deceased employee to recover exemplary damages against an employer, in addition to workers compensation insurance benefits, if the beneficiaries can demonstrate that the death of the employee was caused by the employer's gross negligence. TEX. LAB. CODE § 408.001. This gross negligence exception does not apply to governmental entities.⁴

³ "A governmental unit that has workers' compensation insurance or that accepts the workers' compensation laws of this state is entitled to the privileges and immunities granted by the workers' compensation laws of this state to private individuals and corporations." TEX. CIVIL PRAC. & REM. CODE § 101.028.

⁴ *Landeros v. City of El Paso*, 804 S.W.2d 188 (Tex. App.—El Paso 1991, writ denied) (the administratrix of the estate of a deceased public employee could not maintain an action for exemplary damages for willful acts or omissions or gross negligence under the workers' compensation statute). *See also* TEX. LAB. CODE §504.002(c) (Vernon 2006) ("Neither this chapter nor Subtitle A authorizes a cause of action or damages against a political subdivision or an employee of a political subdivision beyond the actions and damages authorized by Chapter 101, Civil Practice and Remedies Code").

B. Definitions.

The determination of whether a common law claim will be barred by the Workers' Compensation Act turns first on the question of whether the claimant is an "employee" of the person or entity against whom the claim is brought. There are a number of different statutory definitions for the nouns "employer" and "employee" in the Act but no definition for the verb "employ".

1. Employer.

In Chapter 401, which contains general provisions, the Act defines an "employer" as:

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.

TEX. LAB. CODE § 401.011(18) (Vernon 2006).

In Chapter 406, which contains provisions related to workers' compensation insurance coverage, the Act defines an "employer" as:

a person who employs one or more employees.

TEX. LAB. CODE § 406.001 (Vernon 2006). *See Garza v. Exel Logistics, Inc.*, 161 S.W. 3d 475, 476 (Tex. 2005).

In certain circumstances, an employee can have more than one employer within the meaning of the Texas Workers' Compensation Act, and each employer may raise the exclusive remedy provision as a bar to the employee's claims. *Western Steel Co., Inc. v. Altenburg*, 206 S.W.3d 121 at 123.

2. Employee.

In Chapter 401, the Act defines the term "employee" as follows:

a) ... 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:

(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.

(d) A person who is an employee for the purposes of this subtitle and engaged in work that otherwise may be legally performed is an employee despite:

(1) a license, permit, or certificate violation arising under state law or municipal ordinance; or

(2) a violation of a law regulating wages, hours, or work on Sunday.

(e) This section may not be construed to relieve from fine or imprisonment any individual, firm, or corporation employing or performing work or a service prohibited by a statute of this state or a municipal ordinance.

In Chapter 504, governing workers compensation coverage for the employees of political subdivisions, the Act defines an “employee” as:

(A) a person in the service of a political subdivision who has been employed as provided by law; or

(B) a person for whom optional coverage is provided under Section 504.012 or 504.013.

TEX. LAB. CODE §504.001 (Vernon 2006). Section 504.012 applies to any volunteers the political subdivision has elected to cover. Section 504.013 applies to the board members and staff of a self-insurance fund that provides workers compensation coverage.

III. BORROWED SERVANT DOCTRINE

A. Generally.

The Workers’ Compensation Act does not specifically address the question of whether an employee who is loaned by one employer to another is an employee of the borrowing employer for purposes of applying the exclusive remedy provision. Nor does it address the question of whether the borrowing or lending employer can rely on insurance coverage provided by the other.

The terms “borrowed employee” and “borrowed servant” have been used by the courts to describe situations where a person who is in an employment relationship with one employer is “loaned” to another employer to perform services for that employer for a particular time period or purpose. Generally, where a person is found to be a borrowed employee, his legal status will be the same as a regular employee of the borrowing employer.⁵

For instance, an employer who borrows an employee will have the same liability for the negligent

⁵ One exception is in the context of Title VII, the federal statutory scheme prohibiting certain forms of employment discrimination. The United States Court of Appeals for the Fifth Circuit has specifically rejected the borrowed servant doctrine as a test for determining a person’s employment status under Title VII. *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 505 (5th Cir.1994).

acts of the borrowed employee as for its regular employees. *Producer's Chem. Co. v. McKay*, 366 S.W.2d 220, 225 (Tex.1963).

If the general employees of one employer are placed under control of another employer in the manner of performing their services, they become his special or borrowed employees. If the employees remain under control of their general employer in the manner of performing their services, they remain employees of the general employer and he is liable for the consequences of their negligence.

Id.

Importantly, the borrowing employer will also be treated as an employer for purposes of applying the exclusive remedy provisions of the Workers' Compensation Act. *Western Steel Co., Inc. v. Altenburg*, 169 S.W.3d 347, 350 (Tex.App.-Corpus Christi 2005), *rev'd on other grounds*, 206 S.W.3d 121 (Tex. 2006).

B. The control test.

The principal factor considered in determining whether a person is a borrowed employee of a particular employer is the degree to which that employer controls the employee's work. *Id.* See also *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 537 (Tex. 2002); *Sparger v. Worley Hosp., Inc.*, 547 S.W.2d 582, 583 (Tex.1977). As a general rule, the control test will prevail even where a contract exists that identifies the person as an employee of another.

“A contract between two employers providing that one shall have the right of control over certain employees is a factor to be considered, but it is not controlling. ... A contract will not prevent the existence of a master-servant relationship where the contract is ‘a mere sham or cloak designed to conceal the true legal relationship between the parties.’ ... Where the right of control prescribed or retained over an employee is a controverted issue, it is a proper function for the fact-finder to consider what the contract contemplated or whether it was even enforced.”

Exxon Corp. v. Perez, 842 S.W.2d 629, 630 (Tex. 1992) citing *Producer's Chem. Co. v. McKay*, 366 S.W.2d 220 (Tex.1963); *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 590 (Tex.1964); see also *Swift v. Aetna Casualty & Surety Co.*, 449 S.W.2d 818, 821 (Tex. Civ. App.-Houston [14th Dist.] 1970, no writ); *Highlands Underwriters Ins. Co. v. Martinez*, 441 S.W.2d 666, 667-68 (Tex. Civ. App.-Waco 1969, writ ref'd n.r.e.) and others.

Examples of evidence demonstrating the existence of a right of control include:

- evidence that the borrowing employer's foreman supervised the job site and instructed the borrowed employee as to precisely where and how the pipe should be cut, i.e., directing the details of the work, *Exxon Corp. v. Perez*, 842 S.W.2d at 630;
- evidence that the borrowing employer exercised the type of control that included when and where to begin and stop work, the regularity of hours, the amount of time spent on particular aspects of the work, the tools and appliances used to perform the work, and the physical method or manner of accomplishing the end result. *Thompson v. Travelers Indem. Co. of Rhode Island*, 789 S.W.2d 277, 279 (Tex. 1990);
- evidence that the borrowing employer told the borrowed employee what to do and how to do it on a daily basis and that the employee was injured while following the specific directions of the special employer's supervisor. *Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 477 (Tex. 2005).

C. Temporary employees.

The Texas Supreme Court has applied the traditional control test to workers provided by temporary employment agencies. *Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 477 (Tex. 2005).

[I]n determining if a general employee of a temporary employment agency is also an employee of a client company for purposes of the [Workers' Compensation] Act, we consider

traditional indicia, such as the exercise of actual control over the details of the work that gave rise to the injury.”

Id.

IV. STATUTORY PROVISIONS

The Texas Labor Code contains three chapters that address various arrangements under which one company regularly “loans” or rents workers to another. Those statutes are:

Chapter 91, “Staff Leasing Services”;

Chapter 92, “Temporary Common Worker Employers”;

Chapter 93, “Temporary Employment Services”.

Only the Staff Leasing Services chapter addresses the workers compensation issues raised by the arrangement.

A. Staff leasing services.

Chapter 91 of the Texas Labor Code establishes a comprehensive regulatory scheme for companies that are in the business of providing their clients with a full staff of employees on a long-term or ongoing basis.

“Staff leasing services” means an arrangement by which employees of a license holder are assigned to work at a client company and in which employment responsibilities are in fact shared by the license holder and the client company, 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. The term includes professional employer organization services. The term does not include:

(A) temporary help;

(B) an independent contractor;

(C) the provision of services that otherwise meet the definition of “staff leasing services” by one person solely to other persons who are related to the service provider by common ownership; or

(D) a temporary common worker employer as defined by Chapter 92.⁶

TEX. LAB. CODE §91.001(14)(Vernon 2006).

Under Chapter 91 the company that pays and provides the worker is the “license holder, the company that uses the worker is the “client company”, and the worker is the “assigned employee.” TEX. LAB. CODE §91.001 (Vernon 2006).

The statute provides that the staff leasing company and the client company are “co-employers” for purposes of workers’ compensation insurance. TEX. LAB. CODE §91.042 (c) (Vernon 2006). Chapter 91 “statutorily supersedes the common law right-of-control test in determining employer status of leased employees for workers’ compensation coverage purposes.” *Texas Workers’ Compensation Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 595-596 (Tex. 2000).

If the staff leasing company has workers’ compensation coverage for its employees and an assigned employee is injured while working at a client company’s jobsite and later sues, both the staff leasing company and the client company will be protected by the exclusive remedy provision of the Workers’ Compensation Act, even if the client company does not have workers’ compensation insurance coverage.

In *Vega v. Silva*, 223 S.W.3d 746 (Tex. App.—Dallas 2007, no pet.) an employee of a staff leasing company tried to hold the client company liable for her injuries because the workers’ compensation policy only listed the staff leasing company as an insured and there was no separate policy listing the client company as an insured. The court rejected the employee’s argument, distinguishing the facts from *Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473 (Tex. 2005), and noting that *Garza* involved a temporary employment agency, not a staff leasing company under Chapter 91 of the Texas Labor Code.

On the other hand, if the staff leasing company elects not to provide workers’ compensation

⁶ See discussion at p. 8, *infra*.

insurance coverage to its employees, it is at least possible that the client company will not be protected by the exclusive remedy provision, even if it has its own workers' compensation insurance. This risk exists because, under the statute, the staff leasing company, not the client company, has the exclusive right to elect whether to obtain workers' compensation coverage. TEX. LAB. CODE §91.042(d) (Vernon 2006). See *Texas Workers' Compensation Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 594 (Tex. 2000).

In order for a business to qualify as a staff leasing company under Chapter 91 it must obtain a license from the state. TEX. LAB. CODE §91.011 (Vernon 2006).⁷ Information on the license status of staff leasing companies is available on the website of the Texas Department of Licensing and Regulation at <http://www.license.state.tx.us>. The staff leasing company is also required to have written contracts with each of its clients and those contracts must contain certain mandatory provisions. TEX. LAB. CODE §91.032 (Vernon 2006).

B. Temporary Common Workers.

Chapter 92 of the Texas Labor Code regulates companies that are in the business of providing low skilled employees on a temporary basis. The chapter defines a "common worker" as:

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.

Chapter 92 requires generally that a company that employs and provides common workers to others must obtain a state license for each location at which it operates. TEX. LAB. CODE §92.011 (Vernon 2006).⁸

⁷ Does Chapter 91 have any application to a staff leasing company that has not obtained the required license? The issue was raised, but not decided, in *Guerrero v. Harmon Tank Co., Inc.*, 55 S.W.3d 19 (Tex. App.-Amarillo 2001, pet. denied).

⁸ Information on which companies hold licenses as "temporary common worker employers is available on the web page of the Texas Department of Licensing and Regulation. (<http://www.license.state.tx.us>).

However, the chapter exempts a laundry list of agencies that might otherwise be covered. TEX. LAB. CODE §92.012 (Vernon 2006).

This chapter does not apply to:

- (1) a temporary skilled labor agency;
- (2) a staff leasing services company;
- (3) an employment counselor;
- (4) a talent agency;
- (5) a labor union hiring hall;
- (6) a temporary common worker employer that does not operate a labor hall;
- (7) a labor bureau or employment office operated by a person for the sole purpose of employing an individual for the person's own use; or
- (8) an employment service or labor training program provided by a governmental entity.

Id.

There are no provisions in Chapter 92 for co-employer workers' compensation coverage. The statute merely provides that the company that employs and provides the temporary common workers is the employer of the workers that it provides. TEX. LAB. CODE §92.021 (Vernon 2006). The Dallas Court of Appeals has held that this provision does not supersede the borrowed servant doctrine so as to preclude the client company from qualifying for the exclusive remedy defense as an employer under the right of control test. *Richmond v. L.D. Brinkman & Co. (Texas) Inc.*, 36 S.W.3d 903 (Tex. App. – Dallas 2001, pet. denied).

Richmond was decided under Chapter 92 of the Labor Code. Both the company that provided the common worker and the client company had workers' compensation coverage. The insurance carrier for the company that provided the worker paid benefits to the worker. The contract between provider and the client company (the work ticket) stated that the client company "is the worksite employer with authority to direct the work to be done, schedule hours, assign duties and supervise the employees."

C. Temporary Employment Services.

Chapter 93 of the Texas Labor Code is a narrow statute that prohibits employers of temporary employees from discriminating against employees who do not have a high school diploma or graduate equivalency diploma. It applies to:

A person who employs individuals for the purpose of assigning those individuals to the clients of the service to support or supplement the client's workforce in a special work situation, including:

- (A) an employee absence;
- (B) a temporary skill shortage;
- (C) a seasonal workload; or
- (D) a special assignment or project.

TEX. LAB. CODE §93.001(1) (Vernon 2006).

V. CASE LAW

For the most part, the state legislature has left it to the courts to determine how the Workers' Compensation Act's exclusive remedy defense is to apply when there are two possible employers for a single worker.

A. TEXAS SUPREME COURT CASES

The Texas Supreme Court has had a number of occasions to determine who is entitled to the exclusive remedy defense where there is more than one possible employer.

1. *Wingfoot Enterprises v. Alvarado*, 111 S.W.3d 134, 135 (Tex. 2003).

In *Alvarado*, the Court established the general rule that an employer must purchase its own workers' compensation insurance coverage in order to protect itself from common law tort claims by its employees. Absent express statutory authority, it cannot rely on the workers compensation insurance coverage of the company that provides the worker.

In *Alvarado*, Tandem, the temporary general labor employment agency, provided employee Alvarado to Web under an oral agreement regarding employees' wages and hiring and firing. There was no express agreement between Tandem and Web regarding workers' compensation coverage for the

temporary employees. In practice, Tandem provided workers' comp insurance for its employees, and Web provided workers' comp insurance for its employees. On-site supervision and direction of the temporary employees was split between Tandem and Web.⁹ Tandem was not a staff leasing services company under Chapter 91 of the Texas Labor Code.

Alvarado was injured while working at Web and recovered workers' compensation benefits from Tandem's carrier. She sued both Tandem and Web alleging common law tort claims. Tandem obtained an interlocutory summary judgment denying her claims for an unspecified reason (one ground urged was the exclusive remedy defense.) Her personal injury suit proceeded to trial against Web. The jury found that Alvarado was the borrowed employee of Web at the time she was injured. Because Web had workers' compensation coverage, the court rendered final judgment for Web based on the exclusive remedy defense of TEX. LAB. CODE §408.001. Alvarado did not appeal the judgment in favor of Web. Instead, she appealed the summary judgment that had been granted to Tandem before the trial.

The Supreme court granted the petition for review "to resolve differing views among the courts of appeal as to whether a general employer 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 the employee's work were under the control and supervision of another entity." *Id.* at 136–137. The court concluded that Tandem, the temporary employment agency, was entitled to rely on the exclusive remedy defense of §408.001 and that an employee can have two employers for the purposes of the exclusive remedy defense.¹⁰ *Id.* at 135.

⁹ "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." *Id.* at 138.

¹⁰ The court assumed, without deciding, that Alvarado was Web's borrowed employee.

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 Act, then that employer should be subject to common law liability without the benefit of the defenses enumerated in section 406.033.

Id. at 143.

In reaching this decision, the court was careful to limit it holding to the specific issue before it.

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.

Id. at 144.

The court expressly disapproved of the following cases holding that there can be only one employer for workers' compensation purposes. *Smith v. Otis Engineering Corp.*, 670 S.W.2d 750 (Tex. App.—Houston [1st Dist.] 1984, no writ); *Archem Co. v. Austin Industrial, Inc.*, 804 S.W.2d 268 (Tex. App.—Houston [1st Dist.] 1991, no writ); and *Coronado v. Schoenmann Produce Co.*, 99 S.W.3d 741 (Tex. App.—Houston [14th Dist.] 2003, no pet.). *Id.* at 149.

The *Alvarado* court concluded that the right of control principles of respondeat superior and the borrowed servant doctrine do not foreclose the possibility that there can be two employers for workers' compensation purposes. *Id.* at 146. It cited *Chapa v. Koch Refining Co.*, 985 S.W.2d 158 (Tex. App.—Corpus Christi 1998), *rev'd on other grounds*, 11 S.W.3d 153 (Tex. 1999) and *Texas Industrial*

Contractors, Inc. v. Ammean, 18 S.W.3d 828 (Tex. App.—Beaumont 2000, pet. dism'd by agr.) for the concept that the common law right of control test did not deprive an employer of the benefit of the exclusive remedy defense when an employee was injured while the details of that employee's work were under the control of another. *Id.* at 146-147.

There was a concurring opinion by Judge Enoch, who argued that the right of control test should be rejected as the test to apply when determining who the employer is in the workers' compensation context. *Id.* at 150.

2. ***Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473 (Tex. 2005).**

In *Garza*, the Court answered the question of what happens when the company that is using the worker does not have its own workers compensation insurance but agrees to pay for the workers compensation coverage provided by the company that is paying and providing the worker. The Court's answer was that the company that is using the employee is not entitled to the exclusive remedy defense if it does not have its own workers' compensation insurance coverage.

The temporary worker in *Garza* was supplied by Interim, a temporary employment agency, to perform work for Exel, the client company. The agreement between Interim and Exel provided that Interim would purchase workers' compensation insurance to cover the employees it supplied to Exel, and Exel would pay Interim's costs associated with maintaining the workers' compensation insurance.

In its opinion, the court first reiterated its holding from *Alvarado*:

[W]e held that an employee of a temporary employment agency who is injured while working under the direct supervision of a client company, is conducting the business of both ... and should be able to recover worker's compensation benefits from either employer, and that 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.

Id. at 475 (internal quotations omitted)

The court then concluded that it was not sufficient for the client company (1) to pay for the temporary agency to purchase the workers' compensation insurance policy that covered the temporary employee; or (2) to require in its contract that the temporary agency obtain workers' compensation insurance to cover the temporary employee.

The Act does not permit a temporary employment agency like Interim to obtain coverage for a client simply by obtaining coverage for itself. There must be explicit coverage for the client ... [evidence that indicates] that an insurance company has contracted to secure [the client company's] liability and obligations, as distinguished from [those of the temporary agency].

Garza, 161 S.W.3d at 478.

The court found that the undisputed evidence demonstrated that, at the time *Garza* was injured,

Exel has not established that it is "covered by workers' compensation insurance coverage" for a "work-related injury sustained by the employee," in this case, *Garza*, which is a prerequisite to the application of the exclusive remedy provision in section 408.001(a).

Id. at 481.

The court was careful to limit its decision to a construction of the Workers' Compensation Act, not an application of general common-law principles regarding vicarious liability for injuries to third parties. *Id.* at 481. In making its decision, the Court considered the Act's definitions of "employer" and "employee," its provisions for an employer to make an election to obtain coverage, and the methods it provided for obtaining coverage. The Court also reviewed the workers' compensation insurance provisions of other sections of the Labor Code: the

Staff Leasing Services Act¹¹ and the provisions pertaining to a general contractor's agreement to provide workers' compensation insurance for a subcontractor's employees.¹²

As in *Alvarado*, the court limited its opinion in *Garza*:

Nor are we called upon to consider today the rights of two workers' compensation carriers who have insured against injuries to the same individual, or whether an injured employee who is insured under more than one workers' compensation policy may retain benefits under both.

Id. at 481.

3. *Western Steel Co., Inc. v. Altenburg*, 206 S.W.3d 121 (Tex. 2006).

Here, *Altenburg* was a temporary worker hired by Unique Employment Service ("Unique") and provided to the client company, *Western Steel* ("Western"), as a temporary worker. *Altenburg* was injured while working for *Western* and was paid benefits under *Unique's* workers' compensation policy.

Altenburg sued *Western*, who defended by pleading that *Altenburg* was its borrowed employee and that the exclusive remedy defense applied. *Western* provided a copy of its workers' compensation insurance policy as evidence at trial. A jury found against *Western* on the borrowed employee issue, and *Western* appealed the factual and legal sufficiency of that finding.

The court of appeals, rather than rule on the issue before it, held that there was no evidence that *Western* had a workers' compensation policy in effect.

The Supreme Court reversed and remanded the case to the court of appeals, noting that the fact that *Western* had workers' compensation insurance was undisputed and that the court of appeals erred in not accepting that fact and ruling on the factual and legal sufficiency of the evidence to support the jury's finding, which was the only issue before it.

¹¹ TEX. LAB. CODE §§91.001 et seq. (Vernon 2006).

¹² TEX. LAB. CODE §406.121–.127 (Vernon 2006).

On remand, the court of appeals found that the evidence was legally insufficient to support the verdict. *Western Steel Co., Inc. v. Altenburg*, No. 13-02-450-CV, 2008 WL 963677 (Tex. App.—Corpus Christi 2008, no pet.).

4. *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349 (Tex. 2009).

In this decision, the Supreme Court construed subchapter F of chapter 406, of the Workers' Compensation Act. That subchapter authorizes a general contractor to purchase workers' compensation insurance coverage for its subcontractors and their employees.

In this case, the premise owner, FMR, hired the general contractor, HCBeck, to construct an office campus. One of the terms of the contract provided that FMR would provide the workers' compensation insurance for the work site through its owner controlled insurance program ("OCIP"). The contract required that this insurance plan be incorporated into all construction contracts entered into by HCBeck with any subcontractors. The agreement also provided that if FMR elected to terminate its OCIP, HCBeck was required to obtain insurance securing itself and all of its subcontractors and employees at FMR's cost.

Rice, one of the employees of a subcontractor (Haley Greer), was injured while working on the project. He collected workers' compensation benefits through FMR's OCIP. He then sued HCBeck alleging common law tort claims. HCBeck, moved for summary judgment under the specific provisions of the Workers' Compensation Act applicable to general contractors who provide workers' compensation insurance for their subcontractors,¹³ claiming the benefit of the exclusive remedy defense. The Supreme Court held:

HCBeck "provides" workers' compensation insurance under the Act because the insurance plan incorporated into both its upstream contract with FMR and its downstream subcontract with Haley Greer included workers' compensation coverage to Haley Greer's employees, and because the contracts specify that HCBeck is

ultimately responsible for obtaining alternate workers' compensation insurance in the event FMR terminated the OCIP. Accordingly, we conclude that HCBeck is Rice's statutory employer under section 406.123(e), and Rice's exclusive remedy is the workers' compensation benefits he has already received.

Id. at 351-352.

The Court conclude that it was sufficient that HCBeck was contractually bound to both FMR and Haley Greer (Rice's employer) to provide alternate insurance, and also financially bound to Haley Greer to pay, even if HCBeck does not make the purchase of insurance itself. *Id.* at 355.

We conclude that the Texas workers' compensation insurance scheme, as enacted by the Legislature, was intended to make the exclusive remedy defense available to a general contractor who, by use of a written agreement with the owner and subcontractors, provides workers' compensation insurance coverage to its subcontractors and the subcontractors' employees."

Id. at 360.

5. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009).

In this case, the Supreme Court was asked to decide whether, under TEX. LAB. CODE §406.123, a premises owner that contracts for the performance of work on its premises, and provides workers' compensation insurance to the contractor's employees pursuant to that contract, is entitled to the benefit of the exclusive remedy defense generally afforded only to employers by the Texas Workers' Compensation Act. The Court held that exclusive remedy defense was available to a premises owner who met the Act's definition of "general contractor," and who also provide workers' compensation insurance to lower-tier subcontractors' employees. *Id.* at 435.

¹³ TEX. LAB. CODE §406.123 (Vernon 2006).

B. COURTS OF APPEALS DECISIONS.

1. *Flores v. North American Technologies Group, Inc.*, 176 S.W.3d 442 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

Skillmaster, a temporary employment agency, hired Flores and then assigned him to work at its client company, TieTek. The contract between Skillmaster and TieTek required that Skillmaster maintain workers' compensation insurance for personnel provided by Skillmaster to TieTek's facility, and pass on the cost to TieTek.

Flores was killed, and his parents sued both Skillmaster and TieTek for wrongful death. Summary judgment was granted to both defendants on the basis of the exclusive remedy defense of §408.001. Flores' parents conceded that the exclusive remedy defense applied to Skillmaster, the temporary employment agency, but appealed the summary judgment in favor of TieTek, the client to whom Flores was assigned at the time of his death.

TieTek argued that Flores was its borrowed employee, or alternatively, that it was a co-employer with Skillmaster and that both it and Skillmaster were entitled to assert the exclusive remedy defense. Flores' parents argued that the Supreme Court had rejected the right-to-control test in *Alvarado* in favor of the Workers' Compensation Act's definition of "employer." The court of appeals concluded that the *Alvarado* court had left the common law test unaffected.

TieTek is in the same position in this case as the client company, Excel, in *Garza*. Therefore, just as Web could be found by a fact finder to be an "employer" for the purpose of the TWCA's exclusive remedy provision based on its control over Alvarado in the absence of a contract regarding workers' compensation, and Excel could be found to be an employer for workers' compensation purposes based on its control over Garza despite the provision of worker's compensation by the staffing company, so too could TieTek be an "employer" if it exercised sufficient

control over the details of the work performed by Mike Flores, even though workers' compensation insurance was procured for Flores by Skillmaster.

Id. at 447-448.

Unfortunately, this is the holding in the court of appeals' opinion in *Garza*, which the Supreme Court ultimately rejected. However, the court of appeals had noted in passing that TieTek had its own workers' compensation insurance for its employees. Thus, that may explain why the case is a "petition denied."

The court also rejected the argument that the contract between Skillmaster and TieTek established that Skillmaster was the employer. It found that the contract did not expressly establish who had the right to control the day-to-day activities of the employees assigned by Skillmaster and that the evidence supported the conclusion that there was no fact issue on whether TieTek controlled the details of Flores' work.

2. *Morales v. Martin Resources, Inc.*, 183 S.W.3d 469 (Tex. App.—Eastland 2005, no pet.).

AMS, a staff leasing company provided Morales to Select Professional Staffing ("Select"), a temporary employment agency, who in turn, provided him to Martin Resources as a worker. Morales was injured while working at Martin Resources. Morales sued both Martin Resources and Select Professional for negligence. Select Professional argued that it had workers' compensation coverage through AMS, the staff leasing company and was entitled to the protection of the exclusive remedy defense. Martin Resources argued that it had its own workers' compensation insurance.

The court concluded that the workers' compensation insurance provided by AMS did not list Select Professional as an insured and that Select Professional could not show that it was an insured under a workers' compensation insurance policy. With regard to Martin Resources, the court found that the insurance policy on which Martin Resources relied did not list the Martin Resources subsidiary for which Morales worked, and thus Martin Resources could not establish that it had workers' compensation coverage for Morales. The court ultimately reversed summary

judgment for both companies because neither proved that they had workers' compensation insurance.

There was no discussion in this case of whether AMS was a staff leasing company under Chapter 91 of the Texas Labor Code. If there had been evidence that it was a staff leasing company, there may have been a different result, for either Select Professional or, perhaps, Martin Resources.

3. *Wesby v. Act Pipe & Supply, Inc.*, 199 S.W.3d 614 (Tex. App.—Dallas 2006, no pet.).

Wesby, a temporary employee, was furnished by Labor Express Temporary Services, a temporary employment agency, to Act Pipe & Supply, the worksite/client employer pursuant to a written contract. The contract provided that Labor Express would provide workers' compensation insurance to any of the employees it assigned to Act Pipe. Part of the compensation paid by Act Pipe to Labor Express was applied toward payment for the workers' compensation insurance coverage. Additionally, Act Pipe had its own workers' compensation policy in effect. Wesby was injured while on Act Pipe's premises. His workers' compensation benefits were paid by the carrier for Labor Express. Wesby then filed a negligence suit against Act Pipe.

Act Pipe filed a summary judgment motion, arguing that (1) the exclusive remedy provision of the Staff Leasing Services Act, Chapter 91 of the Texas Labor Code, applied to bar Wesby's claims; and alternatively, if the Staff Leasing Services Act did not apply, (2) Wesby was the borrowed servant of Act Pipe, and Act Pipe's workers' compensation policy applies to Wesby to bar his negligence claim. The trial court granted Act Pipe's motion for summary judgment and the court of appeals affirmed, reasoning as follows:

For the exclusive remedy provision to apply pursuant to the borrowed servant doctrine, Act Pipe was required to plead and prove: (1) Wesby was a borrowed servant; (2) he was entitled to workers' compensation benefits; and (3) Act Pipe had workers' compensation insurance that covered claims asserted by borrowed employees.

Id. at 619.

4. *Phoenix Assurance Co. of New York v. Dallas Fire Insurance Co.*, No. 13-05-065-CV, 2007 WL 475321 (Tex. App.—Corpus Christi Feb. 15, 2007, pet. denied).

Here, there were two workers' compensation carriers in a dispute about which company was the employer of the temporary employee.

Staff Force, insured by Dallas Fire, was a temporary employment agency that hired Brown. Brown was assigned to work for Austin Roofer's Supply, which was insured by Phoenix Assurance. Brown was injured while working for Austin Roofer's. Brown filed a workers' compensation claim, which both carriers challenged. The hearing officer with the Texas Workers' Compensation Commission determined that Brown did have a compensable injury and that Staff Force was his employer. Thus Dallas Fire had to pay the workers' compensation benefits.

Dallas Fire (Staff Force) challenged the ruling in district court, suing Brown and Phoenix Assurance (Austin Roofer's). On summary judgment, the trial court found that Brown was an employee of Austin Roofer's at the time of his injury, and he was not an employee of Staff Force at the time of his injury.

On appeal, the court noted that implicit in *Alvarado's* holding is the conclusion that when an agreement regarding workers' compensation exists between a temporary staffing agency and its client company, the agreement controls. *Id.* at 5 *citing Alvarado*, 111 S.W.3d at 135, 140-45. Thus, the court concluded:

[T]he threshold issue in a case involving whether a temporary staffing agency and/or its client company is an employer for workers' compensation purposes is whether there is a controlling agreement between the two entities.

Id. at 4.

The evidence demonstrated that Staff Force (Dallas Fire) agreed to assume responsibility for compliance with applicable workers' compensation

laws for any of its employees per the agreement on the back of the time card; however, there was evidence from Austin Roofers (Phoenix Assurance) which indicated that there was no contract between Austin Roofers and Staff Force. Because there was a fact question, the summary judgment for Dallas Fire (Staff Force) was reversed and remanded.

5. *Mosqueda v. G & H Diversified Mfg., Inc.*, 223 S.W.3d 571 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

G & H, a manufacturing firm, used various temporary employment agencies to obtain temporary skilled and unskilled employees. Two agencies that it used were Pacesetter and Link. Plaintiff Mosqueda, a temporary employee who was supplied by Pacesetter, was injured while operating/cleaning a machine under the supervision of a G & H supervisor. She received workers' compensation benefits from Pacesetter's carrier. She then sued G & H alleging common law negligence claims. G & H asserted the exclusive remedy defense. The jury found that Mosqueda was not the borrowed employee of G & H. However, the court granted a JNOV, and Mosqueda appealed. On appeal, the JNOV was affirmed.

Pacesetter's daily time tickets, which reflected the number and identify of temporary employees assigned to G & H, had "Conditions of Service" on the back. The conditions included one stating that Pacesetter was the employer of the employees furnished to G & H and was responsible for the maintenance of workers' compensation insurance. Another condition stated that G & H was the "worksite employer with authority to direct the work to be done ... and supervise the employees." *Id.* at 574-575. The court of appeals found that the printed conditions on the back of the daily time ticket constituted a written agreement between G & H and Pacesetter, and that there was no competent evidence to contradict this contractual evidence of a right to direct and control the details of Mosqueda's particular work at the time she was injured.

Mosqueda argued that she was supervised by another temporary employee provided by Link and that other temporary employee was exercising control over the details of her work when she was injured. However, the court found that, to the extent that a temporary employee, provided by Link, supervised

her, the Link employee was also acting as a borrowed employee of G & H.

VI. SUMMARY AND CONCLUSION.

Employers in Texas who carry workers' compensation insurance for their employees are protected from common law claims for on-the-job injuries suffered by those employees. That protection is provided by the exclusive remedy provision of the Workers' Compensation Act.

As a generally rule, an employer must have workers' compensation insurance coverage for its own employees in order to assert the exclusive remedy defense against the claims of a borrowed employee provide by a temporary employment agency. One exception to that rule is where the employee is provided by a licensed staff leasing services company.

Texas local governmental entities are required to carry workers compensation coverage for their own employees and may elect to provide coverage to volunteers. Under the Workers' Compensation Act, they are protected from liability for on-the-job injuries to their employees and, if they elect to cover them, for their volunteers. This is true even if the employees are provided and paid by a temporary agency or similar company in the business of providing workers to other companies.