NOT DESIGNATED FOR PUBLICATION

JOE DANNY PEREZ	*	**NO. 2013-CA-0712**
VERSUS	*	**COURT OF APPEAL**
TASCH, LLC	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
THE OFFICE OF WORKERS' COMPENSATION
NO. 2012-03377, DISTRICT "EIGHT"
Honorable Robert Varnado, Workers' Compensation Judge
* * * * * *

Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Paul A. Bonin, Judge Rosemary Ledet)
LEDET, J., CONCURS WITH REASONS

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REVERSED AND REMANDED

NOVEMBER 13, 2013

In this appeal, the claimant, Joe Danny Perez, seeks review of the judgment of the workers' compensation judge finding that Tasch, L.L.C. (Tasch) was not the statutory employer of Mr. Perez. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

Mr. Perez filed a disputed claim for compensation on May17, 2012, alleging that he was injured after falling from a roof while pressure washing. Mr. Perez claimed that Tasch was his employer.

At trial, Jack Allen, Jr., the managing member of Tasch, testified that Tasch has no employees. Mr. Allen stated that Tasch is engaged in the construction business and that Tasch hires subcontractors. Mr. Allen noted that Tasch was hired by Ikon Construction (Ikon) to perform painting and other work at St. Mary of the Angels school. Ikon acted as the general contractor. Mr. Allen testified that he hired Doug Gamso to pressure wash and seal the exterior of the school. Mr. Allen stated that he believed Mr. Gamso was performing this work alone and that the work should have taken Mr. Gamso a week to perform. Mr. Allen paid Mr. Gamso $2,000.00 for the pressure washing and sealing work. Mr. Allen stated that he did

not pay Mr. Perez. Mr. Allen testified that he did not require Mr. Gamso to have workers' compensation insurance because any injury sustained by Mr. Gamso would be covered by the insurance issued to Tasch. Mr. Allen agreed that employees of Mr. Gamso would likewise fall under Tasch's workers' compensation insurance. Mr. Allen acknowledged that Tasch has hired Mr. Gamso for work performed at the school and that Mr. Gamso has brought a crew on subsequent jobs.

Mr. Allen testified that he was first notified of the injuries sustained by Mr. Perez some days after the accident. Mr. Allen noted that Mr. Gamso informed him that his friend Mr. Perez sustained injuries from a fall at the school. Mr. Allen testified that he felt a job site was not an appropriate place to bring family members or friends. Mr. Allen stated that Mr. Gamso claimed Mr. Perez wanted Mr. Gamso to pay his medical bills. Mr. Allen did not know Mr. Perez was injured while performing work for Mr. Gamso until receiving a letter from Mr. Perez's attorney.

Mr. Perez testified that Mr. Gamso contacted him to inquire whether Mr. Perez could provide assistance to complete the job at the school. Mr. Perez noted that Mr. Gamso contacted someone to let them know that Mr. Perez would be working with Mr. Gamso at the school. Mr. Perez stated that he worked three days for Mr. Gamso at a rate of $250.00 per day. Mr. Perez stated that on the third day, he was working on the roof pressure washing and scrubbing gutters. Mr. Perez noted that no safety rope or harness was issued to him while he worked at the school. Mr. Perez testified that he had safety goggles on, but stuff still managed to get into his eyes. Mr. Perez stated that he stepped off the roof and fell sixteen or eighteen feet onto an air conditioning unit. Mr. Perez noted that it took some time

before he was able to rise and get to the bottom. Mr. Perez stated that his foot started swelling, and he believed that he had sustained a sprain. Mr. Perez testified that he helped Mr. Gamso finish up by organizing and securing items in the trailer.

On the night of the accident, Mr. Perez noticed blood in his urine. At that point, Mr. Perez asked his wife to take him to the emergency room. Mr. Perez testified that the hospital ran several tests, and he learned that he had sustained a fracture to his foot. Mr. Perez noted that he did not receive follow up care because he had no insurance and was unable to pay. Mr. Perez testified that Mr. Gamso agreed to pay his medical bills, but only paid $8.00 for pain medication.

The workers' compensation judge took the matter under advisement at the close of the testimony. The parties submitted post trial briefs. Thereafter, the workers' compensation judge issued a judgment in favor of Tasch, dismissing all of the claims of Mr. Perez with prejudice. The workers' compensation judge issued oral reasons for judgment.

STANDARD OF REVIEW

In worker's compensation cases, the appropriate standard of review to be applied by the appellate court to findings of fact is the manifest error-clearly wrong' standard. *Dean v. Southmark Construction*, 2003–1051, p.7 (La. 7/6/04), 879 So.2d 112, 117. When legal error interdicts the fact-finding process in a workers compensation proceeding, the *de novo*, rather than the manifest error, standard of review applies. *MacFarlane v. Schneider Nat'l Bulk Carriers, Inc*., 2007–1386, p.3 (La. App. 4 Cir. 4/30/08), 984 So.2d 185, 188. Likewise, interpretation of statutes pertaining to workers' compensation is a question of law and warrants a *de novo* review to determine if the ruling was legally correct. *Id*.

DISCUSSION

In his first assignment of error, Mr. Perez averred that the trial court erred in determining that he was not a statutory employee of Tasch.

In discussing workers' compensation, we have noted:

> The Louisiana workers' compensation legislation reflects a compromise between the competing interests of employers and employees: the employer gives up the defense it would otherwise enjoy in cases where it is not at fault, while the employee surrenders his or her right to full damages, accepting instead a more modest claim for essentials, payable regardless of fault and with a minimum of delay.

Lopez v. U.S. Sprint Communications Co., 2007-0052, p.5 (La. App. 4 Cir. 12/5/07), 973 So.2d 819, 823.

Specifically, Louisiana workers' compensation legislation provides:

> A. (1)(a) Except for intentional acts provided for in Subsection B, the rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights, remedies, and claims for damages, including but not limited to punitive or exemplary damages, unless such rights, remedies, and damages are created by a statute, whether now existing or created in the future, expressly establishing same as available to such employee, his personal representatives, dependents, or relations, as against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal, for said injury, or compensable sickness or disease.
>
> (b) This exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine.
>
> (2) For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business, or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.

La. R.S. 23:1032.

Thus, if Tasch were considered the statutory employer of Mr. Perez, Mr. Perez would be limited to seeking benefits under the workers' compensation legislation.

The law regarding statutory employers in Louisiana provides:

> A. (1) Subject to the provisions of Paragraphs (2) and (3) of this Subsection, when any "principal" as defined in R.S. 23:1032(A)(2), undertakes to execute any work, which is a part of his trade, business, or occupation and contracts with any person, in this Section referred to as the "contractor", for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal, as a statutory employer, shall be granted the exclusive remedy protections of R.S. 23:1032 and shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed. For purposes of this Section, work shall be considered part of the principal's trade, business, or occupation if it is an integral part of or essential to the ability of the principal to generate that individual principal's goods, products, or services.
>
> (2) A statutory employer relationship shall exist whenever the services or work provided by the immediate employer is contemplated by or included in a contract between the principal and any person or entity other than the employee's immediate employer.
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> (3) Except in those instances covered by Paragraph (2) of this Subsection, a statutory employer relationship shall not exist between the principal and the contractor's employees, whether they are direct employees or statutory employees, unless there is a written contract between the principal and a contractor which is the employee's immediate employer or his statutory employer, which recognizes the principal as a statutory employer. When the contract recognizes a statutory employer relationship, there shall be a rebuttable presumption of a statutory employer relationship between the principal and the contractor's employees, whether direct or statutory employees. This presumption may be overcome only by showing that the work is not an integral part of or essential to the ability of the principal to generate that individual principal's goods, products, or services.

La. R.S. 23:1061.

First, we note that subsection (A)(3) is not applicable as no written contract was entered into evidence by either part.

Thus, we turn our attention to La. R.S. 23:1061(A)(2). When a principal under contract to perform work contracts with another to perform all or any part of the work the principal is contractually obligated to perform, this is commonly referred to as the "two-contract" theory. *Lopez*, 2007-0052, p.8, 973 So.2d at 825. "The purpose behind the 'two contract' theory is to establish a compensation obligation on the part of a principal who contractually obligates itself to a third party for the performance of work and who then subcontracts with intermediaries whose employees perform all or any part of the work." *Id., quoting Thomas v. State, Dept. of Transp. and Dev*., 27, 203, p.4 (La. App. 2 Cir. 10/12/95), 662 So.2d 788, 792. Such a principal receives a benefit in that the principal is insulated from tort liability. *Id*.

The "two-contract" theory applies when: "1) the principal enters into a contract with a third party; 2) pursuant to that contract, work must be performed; and 3) in order for the principal to fulfill its contractual obligation to perform the work, the principal enters into a subcontract for all or part of the work performed." *Lopez*, pp.8-9, 973 So.2d at 825, *quoting Allen v. Ernest N. Morial-N.O. Exhibition Hall Authority*, 2002-1072, p.8 (La. 4/9/03), 842 So.2d 373, 379.

Before applying the "two-contract" test, we first note that Tasch is a principal. Tasch entered into a contract with a third party, Ikon, to perform construction-related work at the school. As noted earlier, a "principal" is any person who agrees to perform any "work which is a part of his trade, business, or

occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof." According to Mr. Allen, Ikon hired Tasch to perform work at the school which included painting, pressure washing, and applying a sealant, which is part of Tasch's trade or business. Then, Tasch contracted with Mr. Gamso to perform part of the work Tasch agreed to perform for Ikon.

The workers' compensation judge concluded in its' oral reasons for judgment that Tasch was a subcontractor and not a statutory employer. The oral reasons implied that a subcontractor could not be a principal. The jurisprudence notes that the "two-contract" theory "contemplates relationships among **at least** three parties: a general contractor, hired by a third party to perform a specific task; a subcontractor, hired by that general contractor; and an employee of the subcontractor." *Lopez*, 2007-0052, p.8, 973 So.2d at 825. Nothing in the legislation or the jurisprudence limits how many parties may be involved or who may be a principal. Tasch's status as a subcontractor to Ikon does not bar Tasch from becoming a principal. Tasch contracted with Mr. Gamso to perform part of the work Tasch was to perform pursuant to Tasch's contract with Ikon. As a result of Tasch's action, Tasch became the principal.

The workers' compensation judge concluded in its' oral reasons for judgment that Tasch hired Mr. Gamso to perform a one-person, one-day job. However, Mr. Allen testified that he believed the work would take Mr. Gamso seven days to complete. The fact that Mr. Allen believed that Mr. Gamso was performing the work alone is of no consequence unless that was a contractual requirement. The services or work provided by Mr. Gamso and the men he

employed to assist him was contemplated by or included in the contract between Tasch and Ikon.

Thus, after conducting a *de novo* review of the record, we find the workers' compensation judge erred in determining that Tasch was not the statutory employer of Mr. Perez. Tasch entered into a contract with Ikon for work to be performed. To fulfill its contractual obligation to Ikon, Tasch entered into a contract with Mr. Gamso for performance of a portion of the work owed to Ikon. Mr. Gamso hired Mr. Perez. Under the "two-contract" theory, Tasch is the statutory employer of Mr. Perez.

In his second assignment of error, Mr. Perez argued that the workers' compensation judge erred in not awarding benefits, penalties, and attorneys' fees to Mr. Perez.

To be entitled to workers' compensation benefits, the claimant must establish "personal injury arising out of and in the course and scope of his employment." La. R.S. 23:1031(A). In this context, an accident is "an unexpected or unforeseen actual, identifiable, precipitous event happening suddenly or violently, with or without human fault, and directly producing at the time objective findings of an injury which is more than simply a gradual deterioration or progressive degeneration." La. R.S. 23:1021(1).

Mr. Perez testified that while he was pressure washing, a task Tasch hired Mr. Perez's employer to perform, he fell from the roof and sustained a fracture. Mr. Allen stated that Mr. Gamso informed him that Mr. Perez was injured at the school. Mr. Perez's medical records indicate that he informed the hospital that he sustained the injury after he fell while pressure washing a roof. Thus, the record

contains sufficient proof that Mr. Perez suffered a work related injury and is entitled to workers' compensation benefits from his statutory employer.

However, the record lacks sufficient information for this Court to determine the amount of Mr. Perez's wages in order to determine the proper amount of workers' compensation benefits owed to Mr. Perez. Thus, we remand the matter for the workers' compensation judge to determine Mr. Perez's wages, the amount of benefits owed to Mr. Perez, and the duration of time Mr. Perez shall receive benefits.

Under certain circumstances, penalties and attorneys' fees may be awarded to a claimant. La. R.S. 23:1201 provides in pertinent part:

> Failure to provide payment in accordance with this Section or failure to consent to the employee's request to select a treating physician or change physicians when such consent is required by R.S. 23:1121 shall result in the assessment of a penalty in an amount up to the greater of twelve percent of any unpaid compensation or medical benefits, or fifty dollars per calendar day for each day in which any and all compensation or medical benefits remain unpaid or such consent is withheld, together with reasonable attorney fees for each disputed claim.

La. R.S. 23:1201(F).

Nonetheless, penalties and attorney fees are recoverable unless "the claim is reasonably controverted or if such nonpayment results from conditions over which the employer or insurer had no control." La R.S. 23:1201(F)(2). The Louisiana Supreme Court determined that a claim is reasonably controverted when the employer has sufficient factual and/or medical information to reasonably counter evidence presented by the claimant. *Brown v. Texas–LA Cartage, Inc*., 98–1063, p.9 (La. 12/1/98), 721 So.2d 885, 890.

As this Court has noted:

> [a]n employer or compensation insurer has a duty to investigate and make every reasonable effort to assemble and assess factual and medical information in order to ascertain whether the claim was compensable before denying benefits. *Parfait v. Gulf Island Fabrication, Inc*., 97–2104 (La. App. 1 Cir. 1/6/99), 733 So.2d 11, 25. The Louisiana Supreme Court has held that in a workers' compensation claim, the employer must adequately investigate the claim, and the crucial inquiry is whether the employer had an articulable and objective reason for denying or discontinuing benefits at the time it took that action. *Williams v. Rush Masonry, Inc*., 98–2271 (La. 6/29/99), 737 So.2d 41, 46. When an employer fails to authorize necessary medical treatment, it is deemed to be a failure to furnish workers' compensation benefits and the failure to authorize such treatments subjects the employer to sanctions. *Authement v. Shappert Engineering,* 2002–1631 (La. 2/25/03), 840 So.2d 1181, 1186.

Janneck v. LWCC, 2012-0316, p.3 (La. App. 4 Cir. 10/17/12), 102 So.3d 239, 241-242.

In this instance, because the workers' compensation judge found Tasch was not the statutory employer of Mr. Perez, the workers' compensation judge did not address the issue of penalties. Mr. Allen stated that he had no knowledge that Mr. Gamso had any employees. Mr. Allen testified that two days or so after the accident, Mr. Gamso informed him that a friend had fallen at the school job site. Mr. Allen stated that he thought it was inappropriate to bring friends or relatives to a job site. Counsel for Mr. Perez sent a certified letter to Mr. Allen dated May 14, 2012. The May 14, 2012 letter notified Mr. Allen that Mr. Perez was injured while pressure washing on May 4, 2012. The May 14, 2012 letter requested that Mr. Allen notify his workers' compensation insurance carrier of the injury, begin paying temporary total disability benefits, and authorize treatment with an orthopedic surgeon.

After receiving the May 14, 2012 letter, Tasch took no action to investigate the claim. Thus, Tasch cannot be said to have an articulable and objective reason

for denying benefits to Mr. Perez. Tasch did not reasonably controvert the claim of Mr. Perez. Because the amount of penalties is tied to the amount of workers' compensation benefits received by the claimant, on remand the workers' compensation judge is instructed to award penalties and fees in accordance with La. R.S. 23:1201 after calculating the amount of benefits owed to Mr. Perez.

CONCLUSION

Accordingly, we reverse the judgment of the workers' compensation judge and remand the matter to the workers' compensation judge to determine Mr. Perez's wages, to calculate the amount of benefits owed to Mr. Perez, to determine the duration of time Mr. Perez shall receive benefits, and to assess penalties and fees.

REVERSED AND REMANDED