Opinion issued April 7, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00734-CV

ROBERT EARL WARNKE, Appellant

V.

NABORS DRILLING USA, L.P., NDUSA HOLDINGS CORP., AND BRUCE WILKINSON, Appellees

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On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 2007-21185

O P I N I O N

Robert Earl Warnke filed negligence, fraud, and negligent misrepresentation claims against Nabors Drilling USA, L.P., NDUSA Holdings Corporation, and Bruce Wilkinson arising out of his workplace injury and his claim for workers'

compensation.[1] The trial court granted summary judgment against Warnke disposing of all claims and all parties. Warnke contends the trial court erred in granting summary judgment because (1) Nabors failed to establish that it provided him with pre-injury notice of coverage and such notice is required for it to claim subscriber status under the Texas Workers' Compensation Act (the "Act"); (2) a genuine issue of material fact existed whether Wilkinson was an independent contractor and therefore covered under the Act's exclusive remedy provision; and (3) his claims for fraud and negligent misrepresentation constituted separate injuries from his on-the-job injury and fell outside the protection of the Act's exclusive remedy provision.

We affirm in part, reverse in part, and remand for further proceedings.

Background

Warnke suffered an on-the-job injury when a pipe connected by a co-worker, Bruce Wilkinson, came free and crushed his hand. In his affidavit, Warnke testified that his supervisor told him after his injury that he was not covered by workers' compensation insurance and that an employee in the human resources department, Brandon Cannady, denied the company's responsibility for

[1] Appellees assert that NDUSA Holdings Corp. is the general partner of Nabors Drilling USA, L.P. and therefore an employer within the Act's exclusive remedy provision and Warnke never disputes the contention. We refer to Nabors Drilling USA, L.P. and NDUSA Holdings Corporation collectively as "Nabors."

Warnke's medical expenses. Warnke's wife testified by affidavit that Cannady told her that Warnke was not an employee of Nabors and the company did not provide workers' compensation coverage. Warnke also alleged that Nabors never provided him written notice of coverage under workers' compensation insurance before his injury. Eight months after the accident and about three months after filing suit, Warnke began receiving workers' compensation benefits.

Warnke filed suit against Nabors and Wilkinson, asserting claims of negligence, fraud, and negligent misrepresentation. In his original petition, Warnke claimed that he and Wilkinson were both employees of Nabors. He later amended his petition to plead in the alternative that Wilkinson was an independent contractor.

Nabors and Wilkinson filed a motion for summary judgment arguing that no genuine issue of material fact existed because the Act's exclusive remedy provision bars Warnke's recovery. Nabors and Wilkinson argued that subscriber status does not depend on providing the employee with pre-injury notice of coverage. They also asserted that the exclusive remedy provision excluded Warnke's fraud and negligent misrepresentation claims against all defendants. Warnke responded that (1) Nabors was not a subscriber because it failed to give Warnke notice of coverage and its insurance provider was not authorized to act in

Texas; (2) a fact issue exists regarding whether Wilkinson was an independent contractor and therefore not covered by the exclusive remedy provision; and (3) his fraud and negligent misrepresentation claims arise from a separate injury from the on-the-job injury covered by the Act. The trial court granted summary judgment in favor of Nabors and Wilkinson on all claims.

Summary Judgment Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life Accid. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Under the traditional standard for summary-judgment motions, the movant has the burden to show that no genuine issue of material fact exists and the trial court should grant judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). The motion must state the specific grounds relied upon for summary judgment. TEX. R. CIV. P. 166a(c). When reviewing a summary-judgment motion, we take as true all evidence favorable to the nonmovant, and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Dorsett*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215. A defendant moving for traditional summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or

conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

Exclusive Remedy Under the Workers' Compensation Act

The Act is the exclusive remedy for non-intentional, "work-related injuries" of an employee, and exempts the employer, its agents, and its employees from common-law liability claims based on negligence or gross negligence. *See* TEX. LAB. CODE ANN. § 408.001 (West 2006); *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985). The Act defines "injury" to mean, "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." TEX. LAB. CODE ANN. § 401.011(26) (West Supp. 2010). The exclusive remedy provision is an affirmative defense that the defendant must plead and prove. *See Exxon Corp. v. Perez*, 842 S.W.2d 629, 630–31 (Tex. 1992). The defendant must show that (1) the injured worker was acting as an employee at the time of the alleged tort, and (2) the defendant was a subscriber under the Act. *See Martinez v. H.B. Zachry Co.*, 976 S.W.2d 746, 748 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). Once this showing is made, the exclusive remedy is triggered and all employee claims of work-related negligence and gross negligence are barred. *See* TEX. LAB. CODE ANN. § 408.001; *see also Reed Tool*, 689 S.W.2d at 406.

A. Notice and Subscriber Status

Warnke first contends that Nabors failed to give him pre-injury notice of workers' compensation insurance coverage, and thereby lost its subscriber status and the protection of the exclusive remedy provision. Therefore, the Act did not bar his negligence claim against Nabors as his employer. The Act requires employers to notify "each employee . . . whether or not the employer has workers' compensation insurance coverage." TEX. LAB. CODE ANN. § 406.005 (West 2006). Failure to give notice constitutes an administrative violation punishable by a fine. *See id.* at § 406.005(e); *Wesby v. Act Pipe & Supply, Inc.*, 199 S.W.3d 614, 618 (Tex. App.—Dallas 2006, no pet.).

Courts in this State, including this court, have held that the exclusivity bar does not hinge on whether notice has been provided to the employee. *See, e.g.*, *Wesby*, 199 S.W.3d at 618; *see also Blazik v. Foley's, Inc.*, No. 01-96-01140-CV, 1998 WL 788848, at *3 (Tex. App.—Houston [1st Dist.] Nov. 12, 1998, no pet.) (mem. op., not designated for publication). Although Nabors provided no evidence to show it gave pre-injury coverage notice to Warnke, these cases hold that the Act and the exclusivity provision apply even without such notice.[2]

[2] Warnke asserts we should follow *Ferguson v. Hospital Corp. International Ltd.*, 769 F.2d 268 (5th Cir. 1985), which held the failure to comply with the notice requirement bars an employer from claiming subscriber status. The Fifth Circuit decided *Ferguson* under the previous iteration of the Act. Warnke argues there is no substantive difference between the versions of the Act with regard to notice.

Nabors presented sufficient evidence otherwise to demonstrate subscriber status under the Act. Neither party contests Warnke's status as an employee at the time of his injury. Further, Nabors attached an affidavit from its insurance carrier's managing director stating that his company provided workers' compensation insurance to Nabors at the time of the accident. Nabors also attached the Texas Department of Insurance's certification of the carrier's authority to provide insurance in Texas. Nabors therefore satisfied its burden to demonstrate subscriber status and triggered the exclusive remedy provision of the Act. Accordingly, we hold that the exclusive remedy provision bars Warnke's negligence claims against Nabors for the on-the-job injury of his hand.

We overrule Warnke's complaint as to pre-injury notice and Nabors's subscriber status.

B. Employee or Independent Contractor

Warnke next contends the Act's exclusive remedy provision does not apply to his negligence claim against Wilkinson because Wilkinson failed to prove conclusively that he was an employee of Nabors. *See* TEX. LAB. CODE ANN. § 408.001(a); *see Hughes Wood Prod. v. Wagner*, 18 S.W.3d 202, 206 (Tex. 2000).

However, the Southern District of Texas in *Bradley v. Phillips Chem. Co.*, 484 F. Supp. 2d 604, 618 (S.D. Tex. 2007), *aff'd*, 337 F. App'x 397 (5th Cir. 2009), states *Ferguson* is no longer binding precedent and listed Texas appellate cases decided since *Ferguson* that have held that the exclusivity provision does not hinge on pre-injury notice. *Bradley*, 383 F. Supp. at 618 n.43.

While an employer's exclusive remedy generally covers the liability of its employees, the same protection does not apply to independent contractors without some showing that the employer exercised "employer-like" control over the contractor. *See Garza v. Excel Logistics, Inc.*, 161 S.W.3d 473, 476–77 (Tex. 2005). Nabors and Wilkinson argue that Warnke made a judicial admission that Wilkinson was an employee. As evidence of Wilkinson's employment status as a "co-employee," Nabors and Wilkinson rely on Warnke's amended petition and their second amended answer.

"Assertions of fact, not plead in the alternative, in the live pleadings of a party are regarded as formal judicial admissions." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001). An admission in a pleading must be deliberate, clear, and unequivocal to constitute a judicial admission. *Bowen v. Robinson*, 227 S.W.3d 86, 94 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Warnke's first amended petition labeled Wilkinson as a "co-employee" of Nabors, but it also asserted in the alternative that he was an independent contractor. Pleading in the alternative does not constitute a judicial admission. *See id.* at 95. Labeling Wilkinson as both a "co-employee" and an independent contractor constitutes some evidence of both propositions—that Wilkinson is either a co-employee or an independent contractor. The pleading is not so clear and

unequivocal to prove his employment status conclusively.

Nabors and Wilkinson also attached their second amended answer, which named Wilkinson as a "co-employee." A movant's own pleadings do not constitute summary judgment evidence as a general rule. *Powell v. McCauley*, 126 S.W.3d 158, 162 (Tex. App.—Houston [1st Dist.] 2003, no pet.). The second amended answer, therefore, amounts to no evidence in support of summary judgment. *See id.*

The only summary judgment evidence Nabors and Wilkinson submitted for Wilkinson's employment status was their second amended answer and Warnke's amended petition. Accordingly, they failed to conclusively prove Wilkinson's employment status and a fact issue exists as to whether the exclusive remedy provision applies to Warnke's negligence claim against Wilkinson.

We sustain Warnke's complaint with regard to his common law negligence claim against Wilkinson.

C. Fraud and Negligent Misrepresentation

Warnke next contends that his fraud and negligent misrepresentation claims against Nabors are for injuries separate from his on-the-job hand injury and, therefore, are not covered by the Act or its exclusive remedy provision. In his amended petition, Warnke claims that Nabors committed fraud and made negligent

misrepresentations by deceiving him about his coverage under workers' compensation insurance.

Nabors raises three arguments in response to Warnke's claims. First, Nabors asserts that none of its employees made any fraudulent misrepresentations to Warnke about his insurance coverage. Second, Nabors asserts that Warnke never suffered an injury separate from the physical injury of his hand, and, because he received workers' compensation benefits, he is barred from recovery under an intentional tort theory. Finally, even if its employees made misrepresentations, Nabors contends that it conclusively negated the specific intent requirement for the intentional tort exception—an element for which Warnke would bear the burden of proof at trial.

1. No Misrepresentations

Nabors denies that it made any fraudulent misrepresentations to Warnke. In a summary judgment appeal, however, we must take as true all evidence favorable to the nonmovant, Warnke, and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *See Dorsett*, 164 S.W.3d at 661. Warnke attached his and his wife's affidavits, in which they detailed misrepresentations by Nabors representatives regarding Warnke's workers' compensation status. Under the summary judgment standard of review, we must presume that the

misrepresentations were made regarding Warnke's coverage under workers' compensation insurance.

2. Separate Acts and Independent Injuries

Warnke contends that the Act does not apply to his fraud and negligent misrepresentation claims because these claims concern injuries separate from his on-the-job hand injury.

As stated earlier, the exclusive remedy provision applies to a "work-related injury." An "injury" is defined as, "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." TEX. LAB. CODE ANN. §§ 401.011 (26), 408.001. The Act and its exclusive remedy provision, therefore, apply only to on-the-job physical injuries. *See Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 214 (Tex. 1988).

In *Aranda*, the Texas Supreme Court recognized this distinction under the previous iteration of the Act. *Aranda* upheld an employee's right to bring a claim for the breach of the duty of good faith and fair dealing against a workers' compensation insurance carrier. *Id.* The Court held:

> [T]he remedies afforded by the statute are exclusive only if the injury complained of is an injury contemplated by the Act—a personal injury sustained in the course of employment. The Act was not intended to shield compensation carriers from the entire field of tort law.

Id. In analyzing whether the Act barred the employee's claim, the Court in *Aranda* noted that the employee's liability claim was based on acts "distinct" from the acts that formed the basis of the on-the-job injury. *Aranda*, 748 S.W.2d at 214. Additionally, when the claim is for a second injury in the form of impairment of legal rights, that injury occurs "after the job-related injury." *Id.* Citing *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 933 (Tex. 1983), the Court held that the employee can recover only if he or she demonstrates both that the "intentional act is separate from the compensation claim" and this separate act "produced an independent injury." *Aranda*, 748 S.W.2d at 214.

This court adopted the language in *Aranda* and recognized that "injured employees 'may in the interim incur substantial damages because of an inability to meet basic living expenses or pay for medical care.'" *Tex. Mut. Ins. Co. v. Ruttiger*, 265 S.W.3d 651, 669 (Tex. App.—Houston [1st Dist.] 2008, pet. granted) (citing *Aranda*, 652 S.W.2d at 212).[3] The aggravation of an on-the-job injury as a result of the insurance carrier preventing prompt medical treatment can be considered a separate injury. *Id.* at 670–71.

[3] We recognize that the Texas Supreme Court has been asked to overrule *Aranda*, but the case is still Texas law. Petitioner's Brief on Merits at 27–29, *Tex. Mut. Ins. Co. v. Ruttiger*, No. 08-0751 (filed Apr. 15, 2009). Moreover, even if it were to limit *Aranda*, we would still have to consider *Aranda*'s underlying precedent in *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 933 (Tex. 1983), which utilized the same separate act and injury analysis.

While *Aranda* and *Ruttiger* were suits against insurance carriers, *Harris v. Varo*, 814 S.W.2d 520, 526 (Tex. App.—Dallas 1991, no writ), extended the holding in *Aranda* to fraudulent misrepresentation claims against employers. In *Harris*, the employee suffered an on-the-job injury. She sued for those personal injuries as well as for the fraudulent misrepresentation of her employer's insurance carrier. The Dallas Court of Appeals overturned the trial court's summary judgment on a technical ground—the employer failed to address the employee's fraud claim. *Harris*, 814 S.W.2d at 526. Nevertheless, the court stated that the fraud claim was wholly separate from the employee's claim for her physical injuries. *Harris*, 814 S.W.2d at 526. "Consequently, we hold that the exclusivity provision of the act does not bar [the employee's] claim against [the employer] for the intentional tort of fraud." *Id.* at 526. That part of *Harris* addressing the validity of a fraud claim against an employer was dicta, but this court adopted it in *Blazik v. Foley's Inc*. We stated in *Blazik* that the Act "does not bar an employee from bringing a separate claim against an employer for fraudulent misrepresentations concerning its insurance coverage." *Blazik*, 1998 WL 788848, at *4.

We are not bound by *Blazik* or *Harris*. *See* TEX. R. APP. P. 47.7 (stating opinions published before January 1, 2003 and designated "do not publish" are not

binding precedent); *see also In re Budzyn*, 206 S.W.3d 721, 723 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (stating opinion by a Texas appellate court is not binding on other Texas appellate courts). We are persuaded, however, that the rationale of *Aranda* and *Massey* applies not only to a claim against an insurance carrier, but also to a claim against the employer for misrepresentations concerning insurance coverage.

Additionally, a majority of jurisdictions have found that deceit by the employer or insurance carrier that impairs an employee's legal rights under workers' compensation law constitutes a claim separate from the on-the-job physical injury. *See* 6 Arthur Larson & Lex Larson, LARSON'S WORKER'S COMPENSATION LAW, § 104.03[3], 104.03D[3] n.6, 7 (2010). As summarized by Professor Larson, these cases distinguish between the employee's physical injuries and injuries that impair the employee's legal rights. These courts hold that, as a result of the separate injury, the workers' compensation statutes do not bar recovery for these fraudulent acts. *See, e.g.*, *Persinger v. Peabody Coal Co.*, 474 S.E.2d 887, 896–97 (W.Va. 1996) (holding workers' compensation statute does not preclude employee from maintaining separate and distinct cause of action against employer when employer makes misrepresentations with intent of depriving employee of benefits rightfully due to him); *see also Vandermark v. Southland*

Corp., 525 N.E.2d 1374, 1376–77 (Oh. 1988) (holding employee has tort cause of action when employer never filed employee's workers' compensation claim, but deceived employee that it had so filed); *Caban v. Gottlieb Iron Works*, 558 N.Y.S.2d 810, 813 (1990) (holding exclusive remedy bar not apply to common law action against employer for impairing employees' right to sue third-party tortfeasor). These courts' recognition of a distinction between personal injuries under workers' compensation statutes and separate, independent injuries is consistent with the Texas Supreme Court's decisions in *Aranda* and *Massey*. *See Aranda*, 748 S.W.2d at 214; *see also Massey*, 652 S.W.2d at 933.

Neither party argues that a claim of negligent misrepresentation against the employer should be treated differently than a claim of fraud. Thus, we do not address whether negligent misrepresentation claims should be barred on other grounds.[4]

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[4] We do not, therefore, address the unpublished opinion of *Hair v. Pillsbury Co.*, No. 05-01-01354-CV, 2002 WL 1494922, at *7 (Tex. App.—Dallas July 15, 2002, no pet.)(mem. op., not designated for publication). The Dallas Court of Appeals in that case held that the Act barred an employee's negligent misrepresentation claim arising from the employer's statements that he did not qualify for workers' compensation benefits. The employer maintained that the employee's injury was not work-related, but processed his application for benefits in a timely fashion. *Id.* The Workers' Compensation Commission denied the employee's claim and the employee made no appeal from that decision. *Id.* The court found that an employer should not be liable for negligent misrepresentations because the employer "is authorized to contest the cause of alleged on-the-job injuries and the compensability of certain injuries." *Id.* The court in *Hair* does not address the separate injury argument advanced by Warnke. The facts surrounding the

We hold that the Act does not apply to claims arising from an employer's negligent misrepresentations and fraud with regard to workers' compensation coverage, if the employee can show (1) acts of the employer are separate from the initial injury-causing event and that (2) those acts resulted in a separate and independent injury from the injury compensated under the Act. This rule applies to both Warnke's fraud and negligent misrepresentation claims because both arise out of claimed separate conduct by the employer that caused a separate injury from the damage to his hand. Therefore, the Act, which is limited to on-the-job personal injuries, has no application to Warnke's fraud and negligent misrepresentation claims.

That brings us to the evidence in this case. Nabors had the burden, as the movant, to offer summary judgment evidence that Warnke had not suffered any injuries separate from the hand injury for which he received workers' compensation benefits. Nabors instead merely argued Warnke's injured hand and the misrepresentations of his insurance coverage amounted to the same injury. Employing a "but for" analysis, Nabors asserted that if Warnke "had not received

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negligent misrepresentation claim in *Hair* are also distinguishable from the facts in this case. The Commission's denial of benefits and the employee's failure to appeal that denial imply that the employee sustained no independent injury as a result of his employer's position. In contrast, Warnke waited eight months to receive benefits, according to his pleadings, and took out a loan as a result of the delay. He received payment about three months after filing this suit. The record here does not indicate Nabors' timely action on Warnke's workers' compensation claim and includes some evidence of Warnke's independent injury.

the hand injury, the discussion of workers' compensation benefits would have never occurred." Therefore, the hand injury for which he received workers' compensation benefits was "directly-related" to his alleged tort injuries. In other words, according to Nabors, the requirement of an independent injury was not satisfied.

Nabors's argument cannot substitute for its lack of evidence. We cannot conclude based on the summary judgment record that Nabors demonstrated that Warnke's fraud and negligent misrepresentation claims resulted in damages that are not separate and independent from his physical injury. In oral argument, Warnke stated that he was required to borrow money to obtain medical treatment during the eight months that Nabors denied him coverage. He claims this consequential economic damage as a separate injury. *Aranda* recognized that an independent injury from a failure to pay compensation benefits included losses to credit and reputation or "an inability to meeting basic living expenses." *Aranda*, 748 S.W.2d at 212, 214. Warnke's claims are similar. Warnke also claims that the financial stress caused mental anguish and that this stress constituted an independent injury.[5] Nabors failed to satisfy its burden, as the movant, to demonstrate that Warnke's fraud and negligent misrepresentation claims did not

[5] In oral argument, Warnke acknowledged that the jury should be instructed to only consider mental anguish from the withholding of benefits and not mental anguish associated with the physical injury of his hand.

arise out of different conduct at a different time and did not result in different injuries. Therefore, the Act does not bar recovery for these separate injuries.

3. Intentional Tort Exception

On appeal and at summary judgment, Nabors attempted to reshape Warnke's arguments in terms of the intentional tort exception to the Act's exclusive remedy provision. Warnke's separate-injury argument, however, goes to the applicability of the Act in its entirety, not to an exception to the exclusive remedy.

Under the intentional tort exception, "an employer can, under certain circumstances, be sued at common law for its own intentional torts, even though it provides insurance under the Act." *Urdiales v. Concord Tech. Del., Inc.*, 120 S.W.3d 400, 406 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). The exception to the exclusivity bar is a narrow one. *Reed Tool*, 689 S.W.2d at 407. "[M]ere negligence or willful negligence will not suffice" to fall within the intentional tort exception. *Urdiales*, 120 S.W.3d at 406. Further, the receipt of workers' compensation benefits and recovery against the employer for an intentional tort are generally mutually exclusive remedies. *See Medina v. Herrera*, 927 S.W.2d 597, 601–02 (Tex. 1996).

Nabors asserts that it conclusively negated an element of the intentional tort exception such that summary judgment on Warnke's fraud and negligent

misrepresentation claims was proper. But Nabors's argument conflates the intentional tort exception with the separate injury issue. As discussed above, the Act does not apply to conduct separate from the conduct that caused the on-the-job injury and that resulted in an independent injury. *See Aranda*, 748 S.W.2d at 214. Nabors relies on *Medina*, but in *Medina* both the physical assault and the resulting injury were the same for the intentional tort claims and the compensation claim under the Act. *See Medina*, 927 S.W.2d at 598. Here, the record contains evidence of two different acts—the crushing of Warnke's hand and the misinformation regarding insurance coverage—and uncontroverted allegations of two separate injuries.

We sustain Warnke's complaint as to his fraud and negligent misrepresentation claims against Nabors.

Conclusion

We affirm the trial court's judgment regarding Warnke's negligence claim against Nabors for his on-the-job injury. We reverse that portion of the trial court's judgment concerning Warnke's negligence claim against Wilkinson and his fraud and negligent misrepresentation claims against Nabors. We remand to the trial court for further proceedings not inconsistent with this opinion.

Harvey Brown
Justice

Panel consists of Justices Jennings, Higley, and Brown.