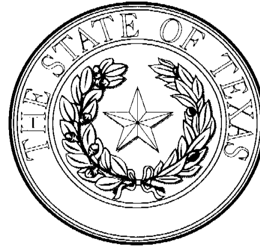
Opinion issued November 29, 2022



In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00755-CV

BERTOLDO BALDERAS, AS NEXT FRIEND OF RIGOVERTO BALDERAS, Appellant

V.

HOUSTON FOAM PLASTICS, INC., Appellee

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case No. 2017-78322

MEMORANDUM OPINION

Appellant, Bertoldo Balderas, as next friend of Rigoverto Balderas ("Rigoverto"), challenges the trial court's rendition of summary judgment in favor of appellee, Houston Foam Plastics, Inc. ("Houston Foam"), in Balderas's suit

against Houston Foam for negligence and gross negligence. In four issues, Balderas contends that the trial court erred in granting Houston Foam summary judgment and failing to continue the abatement of his suit.

We affirm in part and dismiss in part.

Background

In his petition, filed on November 21, 2017, Balderas alleged that "[o]n or about December 5, 2015," Rigoverto entered into a "Client Services Agreement" (the "CSA") with Job Express of Wyoming Incorporated, doing business as Port City Staffing ("Port City Staffing"). The CSA stated that "Port City Staffing would provide temporary employees with certain skills and abilities to [Houston Foam]." (Internal quotations omitted.) Rigoverto, who "was an employee of Port City Staffing at all relevant times," was assigned to Houston Foam to work as a forklift operator.

Under the CSA, Port City Staffing agreed to perform various duties as Rigoverto's employer, including "hiring, assigning, reassigning, counseling, disciplining, and discharging" Rigoverto. (Internal quotations omitted.) "Port City Staffing also calculated [Rigoverto's] worker's compensation coverage." The CSA gave Port City Staffing "the election for workers' compensation coverage of its employees [as] set out in [Texas Labor Code] Chapter 93." And the CSA provided that "additional job descriptions for the temporary employees must be submitted to

Port City Staffing for review prior to placing" an employee in "a new position." (Internal quotations omitted.)

Although Rigoverto was assigned to work at Houston Foam as a forklift operator, on or about December 14, 2015, Houston Foam assigned Rigoverto to work at one of its locations as a grinder operator, without notice to or permission from Port City Staffing. On the morning of December 17, 2015, Rigoverto was given a "large plastic sack" and was instructed to fill it with scrap plastic foam pieces. Rigoverto was then to place the foam pieces into the plastic grinder machine to break them down into small pellets that could be recycled. While Rigoverto was working at the plastic grinder, its interior spokes caught on the handles of Rigoverto's large plastic sack, which pulled Rigoverto's upper torso, head, and arms into the plastic grinder, causing serious injury. Rigoverto underwent multiple surgeries and was eventually discharged from the hospital to a rehabilitation facility for long-term care. He still resides at the rehabilitation facility and requires around-the-clock care.

Balderas alleged that Houston Foam violated the CSA by giving Rigoverto, "who was sent to [Houston Foam] with a job description of forklift operator, the task of . . . grinder operator at a plastic grind[er]," which was at a different location than where Rigoverto had originally been assigned to work, without notice to Port City Staffing. Rigoverto did not receive "adequate training in the operation and feeding

of the [plastic] grind[er]," which also was in an "unsafe location." And Houston Foam knew that the plastic grinder was defective and "its operation was inherently and unreasonably dangerous and resulted in a dangerous activity" on Houston Foam's premises. But Houston Foam "failed to warn [Rigoverto]" of the plastic grinder's "inherently dangerous propensities" and "to provide [Rigoverto] with the necessary instrumentalities," training, and supervision to safely operate the plastic grinder.

Balderas brought claims for negligence and gross negligence against Houston Foam, and he sought damages for Rigoverto's past and future pain and suffering, past and future physical and mental impairment, past and future medical expenses, loss of past and future employment, and exemplary damages. Together with his petition, Balderas filed a plea in abatement and a motion to abate, requesting that the trial court abate his suit against Houston Foam because Houston Foam "may assert . . . [an] exclusive remedy defense" under the Texas Workers' Compensation Act ("TWCA") and "issues" related to "[an] exclusive remedy defense[]" were "pending before" the Texas Department of Insurance ("TDI") – Division of Workers' Compensation ("TDI-DWC").

Houston Foam answered, generally denying the allegations in Balderas's petition and asserting that Rigoverto's injuries were caused by Rigoverto's negligence, including his being "legally intoxicated at the time of" his injury, his

failure "to use proper methods and equipment" for safely operating the plastic grinder, and his failure "to keep his body a safe distance from the moving parts of" the plastic grinder. Houston Foam also asserted that Balderas's claims were "barred under the exclusive remedy provisions" of Texas Labor Code chapters 93 and 408.[1]

Balderas then filed an amended motion to abate on January 30, 2018. As grounds for abatement, Balderas alleged that Rigoverto's employer—Port City Staffing—was a "nonsubscriber"[2] under the TWCA on December 17, 2015—the

---

[1] *See* TEX. LAB. CODE ANN. §§ 93.004(b) ("Workers' Compensation Insurance Coverage"), 408.001 ("Exclusive Remedy; Exemplary Damages"); *see also Balderas v. Zurich Am. Ins. Co.*, No. 14-20-00262-CV, 2022 WL 1257041, at *1 (Tex. App.—Houston [14th Dist.] Apr. 28, 2022, no pet.) (mem. op.) (explaining TWCA "provides that the recovery of workers' compensation benefits is the exclusive remedy for a legal beneficiary of an employee covered by workers' compensation insurance for a work-related death or injury."); *Hunt Constr. Grp., Inc. v. Koenecny*, 290 S.W.3d 238, 243 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (recovery of workers' compensation benefits is exclusive remedy of employee covered by workers' compensation insurance for death of or work-related injury sustained by employee).

[2] A Texas employer has the option of participating in the workers' compensation system. *See* TEX. LAB. CODE ANN. § 406.002; *Koenecny*, 290 S.W.3d at 243. An employer who provides workers' compensation insurance for its employees becomes a subscriber under the TWCA, while an employer who does not provide workers' compensation insurance for its employees is a nonsubscriber. *See Briggs v. Toyota Mfg. of Tex.*, 337 S.W.3d 275, 282 (Tex. App.—San Antonio 2010, no pet.). If the employer chooses not to provide workers' compensation insurance, the employer may not assert common-law defenses against an employee in a negligence suit. *See* TEX. LAB. CODE ANN. § 406.033; *Koenecny*, 290 S.W.3d at 243. If the employer does participate, the employer and the employer's employees are protected from the employee's common-law claims for injuries or death occurring during the course and scope of the employee's work responsibilities, except those claims involving the death of an employee caused by an employer's intentional or grossly negligent conduct. *See* TEX. LAB. CODE ANN. § 408.001; *Konecny*, 290 S.W.3d at 243.

date that Rigoverto was injured. (Internal quotations omitted.) According to Balderas, Port City Staffing's status on that date was documented on the TDI's website. But "a significant number of discrepancies between the alleged workers' compensation carrier filings with" the TDI-DWC, Houston Foam's "filings with the [Occupational Safety and Health Administration], together with the lack of [workers' compensation subscriber] filings by Port City Staffing[,] [were] disputed issues" that were then pending before the TDI-DWC appeals panel, which had primary jurisdiction and "exclusive statutory authority" to determine the issue of coverage for worker benefits. Abatement of Balderas's suit was required because Houston Foam had "plead[ed] the 'exclusive remedy' of workers' compensation defense," which was "contingent upon a finding of coverage and benefits under the [TWCA]."

In his amended motion to abate, Balderas indicated that in September 2017, at the TDI-DWC hearing, an administrative law judge ("ALJ") issued a decision which determined that, at the time that Rigoverto was injured: (1) Rigoverto's employer was CorTech, LLC ("CorTech");[3] (2) Rigoverto was a covered employee under the TWCA; and (3) Rigoverto was in a state of alcohol intoxication.[4] That

---

[3] CorTech is a successor entity to Port City Staffing. *See Balderas*, 2022 WL 1257041, at *2, *6–7.

[4] *See* TEX. LAB. CODE ANN. §§ 410.151–.169 ("Contested Case Hearing").

decision was adopted by an administrative appeals panel.[5] And Balderas sought judicial review of the administrative appeals panel's decision in Harris County District Court (the "judicial review case").[6]

According to Balderas, his negligence and gross negligence claims against Houston Foam were "related to the issues" then pending in the judicial review case because Houston Foam's affirmative defense that the "exclusive remedy" under the TWCA barred Balderas's claims was "contingent upon a finding of coverage and benefits under the [TWCA]," which was an issue that was pending "on appeal" in the judicial review case. (Internal quotations omitted.) Thus, "[t]he doctrine of primary jurisdiction require[d] th[e] [trial] [c]ourt to abate [Balderas's] suit [against Houston Foam] until the administrative proceedings, including [the] judicial review [case], . . . bec[a]me final."

On February 7, 2018, the trial court signed an "Agreed Order of Abatement," in which it ordered that Balderas's suit be "abated until August 13, 2018" and required Balderas to file a notice about the status of the judicial review case on or before August 3, 2018. "If further abatement [was] required," the trial court directed Balderas to "submit a proposed order accordingly."

---

[5] *See id.* §§ 410.201–.209 ("Appeals Panel").

[6] *See id.* §§ 410.251–.308 ("Judicial Review"); *Balderas*, 2022 WL 1257041, at *1.

The trial court lifted its abatement order on August 21, 2018, but on September 25, 2018, after Balderas filed a motion to reconsider and continue abatement, the trial court signed an order abating Balderas's suit against Houston Foam "until such time as [the judicial review case], including final appellate judicial review [was] concluded."

On May 5, 2020, Balderas filed a status report notifying the trial court that after a jury trial in the judicial review case, the trial court in that case had entered its final judgment against Balderas on March 9, 2020, and he had appealed that judgment. At that time, an appeal was pending in the Fourteenth Court of Appeals.[7]

On May 12, 2020, Houston Foam filed a motion to discontinue the abatement, requesting that the trial court lift the abatement and allow Houston Foam to file a motion for summary judgment. It pointed out that both the TDI-DWC and the trial court in the judicial review case had determined "that [Rigoverto] was covered under a policy of workers' compensation insurance provided by the staffing company." Based on that determination, Houston Foam was entitled to "summary judgment based on the [Texas Labor Code's] exclusive remedy provision[]." And "[e]ven if th[e] [trial court's] judgment [in the judicial review case] w[as] ultimately reversed," Houston Foam argued that it was "still entitled to summary judgment because it too

[7] *See Balderas*, 2022 WL 1257041, at *1–12.

was a subscriber to workers' compensation insurance" and thus was "entitled to" the protection of "the exclusive remedy provision[]" which barred Balderas's claims against it.

In its motion, Houston Foam recounted the procedural history of the judicial review case in detail, explaining that on November 14, 2018, the trial court in that case had "entered [a] summary judgment [order]," finding that "on the date of [his injury], [Rigoverto] was employed by CorTech, which was a covered employer [under the TWCA]."[8] The case then proceeded to "trial to a jury solely on the issue of [whether Rigoverto was] intoxicat[ed]" at the time of his injury. And the jury found that Rigoverto "was intoxicated at the time of" his injury.

According to Houston Foam, "there [were] no circumstances under which it c[ould] be liable [to Balderas on his negligence and gross negligence claims] regardless of the outcome of the appeal [in the judicial review case]." First, Houston Foam argued that it was entitled to the protection of the Texas Labor Code's exclusive remedy provision because Rigoverto "was a covered employee at the time of" his injury through a worker's compensation policy "issued to [CorTech], a successor entity to Port City Staffing, the entity Houston Foam contracted with to provide temporary employees." Second, "even if the decision concerning the

---

[8] As noted previously, CorTech is a successor entity of Port City Staffing. *See id.* at *2, *6–7.

staffing company's coverage w[as] reversed," Houston Foam also had workers' compensation insurance for its employees, and it was "entitled to the [protection of the] exclusive remedy provision[]" as well. And, given Balderas's stated belief that the appeal of the judicial review case was not "dispositive of all claims," it was "fundamentally unfair to continue to abate" Balderas's suit against Houston Foam while the judicial review case was pending on appeal. Because of the abatement, Houston Foam "[had] been prevented from doing anything to develop its case or present other defenses" that were not at issue in the judicial review case.

In his response to Houston Foam's motion to discontinue abatement, Balderas noted that the trial court in the judicial review case had concluded that Houston Foam "would not be a proper defendant." That court had also found that Rigoverto was working as a Port City staffing employee "at [Houston Foam's] premises at the time of his injury"; thus, Balderas asserted that Houston Foam was not Rigoverto's employer. And Balderas pointed out that in the agreed abatement order, Houston Foam had acknowledged that "some of the issues to be determined in [the judicial review case] may affect the issues in" Balderas's suit against Houston Foam.

On June 8, 2020, the trial court granted Houston Foam's motion to discontinue abatement, lifted the abatement of Balderas's suit, and entered a new docket control order. Balderas filed a motion to reconsider that ruling, which the trial court denied.

Houston Foam then moved for summary judgment, arguing that it was entitled to judgment as a matter of law on Balderas's negligence and gross-negligence claims because the exclusive remedy provision of the TWCA barred Balderas's claims.[9] According to Houston Foam, under Texas law, the TWCA's exclusive remedy provision applies to the workers' compensation claims of a temporary worker supplied by an outside company upon a "showing that: (1) the client company is the [temporary worker's] employer within the meaning of the [TWCA] and (2) the client company subscribed to workers' compensation insurance." Houston Foam provided evidence that it "directly supervised and controlled the work" that Rigoverto was doing at the time of his injury. And because Houston Foam "had the right to and did exercise actual control over [Rigoverto's] work at the time of [his injury], [Houston Foam] was his employer for purposes of the [TWCA]."

To prove it was "a subscriber to a policy of workers' compensation insurance," Houston Foam attached to its motion the affidavit and the supplemental affidavit of Joe Bernaldez, Houston Foam's human resources manager, in which he stated that on the date of Rigoverto's injury, Rigoverto "was a temporary employee working for Houston Foam pursuant to [the CSA] with . . . Port City Staffing."

[9] *See* TEX. LAB. CODE ANN. § 408.001 ("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.").

Bernaldez also stated that "[a]s part of [Houston Foam's] agreement with Port City Staffing, it maintained [w]orkers' [c]ompensation [i]nsurance covering [Rigoverto]." Houston Foam attached to Bernaldez's supplemental affidavit its "Workers['] Compensation Coverage Verification" from the TDI-DWC as well as a certificate of insurance issued to Houston Foam to confirm Houston Foam's status as a workers' compensation subscriber. Thus, according to Houston Foam, Balderas's claims against it were barred by the TWCA's exclusive remedy provision[10] and Houston Foam was entitled to judgment as a matter of law.

Houston Foam also noted in its summary-judgment motion that "[i]f the appeal" of the judicial review case was "ultimately affirmed, . . . that decision [would be] dispositive" of Rigoverto's claims against Houston Foam.[11] But "for purposes of the motion presently before the [trial] [c]ourt," Houston Foam explained that "the ongoing" judicial review case was "irrelevant."

In his response to Houston Foam's summary-judgment motion, Balderas asserted that the CSA established that Rigoverto was not a Houston Foam employee on the date of his injury. The CSA referred to the workers furnished to Houston Foam as "Port City Staffing Employees," did not permit their assignment by Houston Foam without "prior written permission and direct supervision and control

---

[10] *See id.*

[11] *See id.* §§ 93.004(b), 408.001(a).

of Port City Staffing," did not allow Houston Foam to have Port City Staffing employees "drive [Houston Foam's] vehicles without prior written consent" and indemnification, and required Houston Foam to pay a "conversion fee" to Port City Staffing if it "hire[d] or engage[d] any [e]mployee as an independent contractor." (Internal quotations omitted.) According to Balderas, Rigoverto, at the time of his injury, "was an employee of Port City Staffing who was assigned as a temporary worker to work at [Houston Foam's] premises."

Balderas further argued that the "exercise of actual control over the details of the work that gave rise to [Rigoverto's] injury [was] negated by the [CSA]" because that agreement specifically stated that Houston Foam agreed to accept Rigoverto's assignment "as the employee of Port City Staffing . . . for workers' compensation purposes." (Emphasis omitted.) (Internal quotations omitted.) In addition, Houston Foam "never appeared" as Rigoverto's "subscriber employer" in the TDI-DWC proceedings, and the trial court in the judicial review case denied Houston Foam's petition to intervene. (Internal quotations omitted.) Finally, Houston Foam did not identify the provision of its workers' compensation policy that would have provided coverage to Rigoverto. Balderas attached certain exhibits to his response and also objected to the evidence Houston Foam attached to its summary-judgment motion.

In its reply to Balderas's response, Houston Foam explained that to prevail on its summary-judgment motion, it only needed to show that, at the time of Rigoverto's

injury: (1) Rigoverto was an "employee" of Houston Foam for purposes of the statutory workers' compensation exclusive remedy provision and (2) Houston Foam was a subscriber under the TWCA. (Internal quotations omitted.) And Houston Foam asserted that none of Balderas's summary-judgment evidence controverted its proof of those requirements. The fact that the CSA identified Rigoverto as an employee of Port City Staffing did not, for purposes of the workers' compensation exclusive remedy provision, preclude him from also being an employee of Houston Foam at the time of his injury. And Houston Foam pointed to Bernaldez's affidavit, which it had attached to its summary-judgment motion, wherein Bernaldez described Rigoverto's work and supervision by Houston Foam. Balderas's own pleadings also admitted that Rigoverto was working for Houston Foam pursuant to the CSA with a temporary employment service. Houston Foam had assigned Rigoverto the task he was performing at the time of his injury, directed him on how to work on a specific piece of equipment, and provided him with necessary materials to do the job. Houston Foam had the right to and did exercise actual control over Rigoverto's work at the time he was injured, making Houston Foam Rigoverto's employer for purposes of the TWCA.

Houston Foam further explained that Balderas did not dispute that Houston Foam was a subscriber under the TWCA. And Houston Foam was not required to prove that Rigoverto was covered by its workers' compensation insurance; it was

entitled to the protection of the TWCA's exclusive remedy provision simply by showing that it was a workers' compensation subscriber.

After a hearing, the trial court granted Houston Foam summary judgment and ordered that Balderas "take nothing of and from [Houston Foam]." The trial court also signed a separate order overruling Balderas's objections to Houston Foam's summary-judgment evidence.

Balderas moved to reconsider both of the trial court's orders as well as the trial court's prior orders granting Houston Foam's motion to discontinue abatement and denying Balderas's previously filed motion to reconsider that ruling. After Houston Foam filed a response opposing Balderas's motion, the trial court signed an order denying Balderas's motion to reconsider.

Lifting of Abatement

In his first issue, Balderas argues that the trial court erred in lifting the abatement in his suit against Houston Foam because the issues then pending in the appeal of the judicial review case, namely, the availability of workers' compensation insurance coverage from Port City Staffing, were "inextricably linked" to Houston Foam's pleadings asserting its affirmative defense in this case.

Primary jurisdiction is a judicially-created doctrine, which operates to allocate power between courts and administrative agencies when both have authority to make initial determinations in a dispute. *Subaru of Am., Inc. v. David McDavid Nissan,*

Inc., 84 S.W.3d 212, 222 (Tex. 2002); *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 446 S.W.3d 58, 72 (Tex. App.—Houston [14th Dist.] 2014), *aff'd*, 518 S.W.3d 442 (Tex. 2017). It guides a court in determining whether it should route the threshold decision about certain issues that are "within the special competence of an administrative agency" to that agency. *Beacon Nat'l Ins. Co. v. Montemayor*, 86 S.W.3d 260, 271 (Tex. App.—Austin 2002, no pet.). An agency, such as the TDI-DWC, has primary jurisdiction over a dispute when both the agency and the court have authority to make an initial determination, and the trial court defers to the agency to decide the issue because (1) the agency has expertise in handling the complex problems in the agency's purview and (2) great benefit is derived from the agency uniformly interpreting its laws, rules, and regulations. *Subaru*, 84 S.W.3d at 221; *Forest Oil Corp.*, 446 S.W.3d at 68. "If the primary jurisdiction doctrine requires a trial court to defer to an agency to make an initial determination, the court should abate the lawsuit and suspend finally adjudicating the claim until the agency has an opportunity to act on the matter." *Subaru*, 84 S.W.3d at 221; *see also Ring Energy v. Trey Res., Inc.*, 546 S.W.3d 199, 212 (Tex. App.—El Paso 2017, no pet.) ("When an agency has primary jurisdiction, abatement by the trial court is appropriate so that the agency has an opportunity to act on the matter."). The question of whether an agency has primary jurisdiction is a legal question that we

review de novo. *Subaru*, 84 S.W.3d at 222; *see also Forest Oil Corp.*, 446 S.W.3d at 68.

In the TDI-DWC hearing addressing Balderas's claim for workers' compensation benefits, the ALJ determined that CorTech was Rigoverto's employer at the time of his injury,[12] CorTech carried a workers' compensation insurance policy issued by Zurich American Insurance Company ("Zurich"), and Rigoverto was not entitled to benefits under the policy because he was intoxicated at the time he was injured.[13] *See Balderas v. Zurich Am. Ins. Co.*, No. 14-20-00262-CV, 2022 WL 1257041, at *1 (Tex. App.—Houston [14th Dist.] Apr. 28, 2022, no pet.) (mem. op.). An administrative appeals panel affirmed the ALJ's decision. *Id.* Balderas then filed the judicial review case in Harris County District Court.[14] *See* TEX. LAB. CODE ANN. §§ 410.251, 410.252.

In the judicial review case, the trial court granted Zurich a partial summary judgment, affirming the administrative ruling that Rigoverto's employer was CorTech and that CorTech had a workers' compensation insurance policy issued by Zurich. *Balderas*, 2022 WL 1257041at *2. The trial court then held a jury trial on

---

[12] As noted previously, CorTech is a successor entity of Port City Staffing. *See Balderas*, 2022 WL 1257041, at *2, *6–7.

[13] The Fourteenth Court of Appeals' opinion in the judicial review case describes the evidence linking Port City Staffing to CorTech. *See id.* at *2.

[14] *See Bertoldo Balderas, as next friend of Rigoverto Balderas v. Zurich Am. Ins. Co.*, Cause Number 2017-81573, in the 55th District Court of Harris County, Texas.

the remaining issue of whether Rigoverto was intoxicated at the time he was injured. *Id.* The jury found that Rigoverto was intoxicated when his injury occurred, and the trial court signed a final judgment affirming the administrative appeals panel's decision. *Id.*

The trial court in this case lifted its abatement order while Balderas's appeal of the judicial review case was still pending in the Fourteenth Court of Appeals. In his appeal in the judicial review case, Balderas challenged the trial court's summary-judgment order, asserting again that Port City Staffing was his employer and was not covered under a worker's compensation insurance policy. Balderas also challenged the jury's finding that Rigoverto was intoxicated at the time he was injured. *See id.* at *6–12.

After Balderas filed the appeal in the instant case, the Fourteenth Court of Appeals affirmed the trial court's judgment in the judicial review case. *See id.* at *12. Balderas did not file a petition for review of our sister court's decision and judgment, which became final while this appeal was pending.

Courts are limited by the mootness doctrine to deciding actual controversies. *See, e.g.*, *State ex rel. Best v. Harper*, 562 S.W.3d 1, 6 (Tex. 2018); *City of Houston v. Kallinen*, 516 S.W.3d 617, 622 (Tex. App.—Houston [1st Dist.] 2017, no pet.). If a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome, then the issue becomes moot, and this Court lacks jurisdiction to decide

it.[15] *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001); *Kallinen*, 516 S.W.3d at 622; *see also In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (orig. proceeding) ("A case becomes moot if a controversy ceases to exist between the parties at any stage of the legal proceedings."). The same is true if intervening events make it impossible for this Court to grant the relief requested or otherwise affect the parties' rights or interests. *See Harper*, 562 S.W.3d at 6; *see also Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 162 (Tex. 2012); *O'Hern v. Mughrabi*, 579 S.W.3d 594, 599 (Tex. App.—Houston [14th Dist.] 2019); *Kallinen*, 516 S.W.3d at 622 (case is also moot if judgment would not have any practical legal effect upon then-existing controversy). Under any of those circumstances, a ruling on the merits would be an impermissible advisory opinion. *See In re Gray*, 578 S.W.3d 212, 213 (Tex. App.—Tyler 2019, no pet.); *Reule v. RLZ Inv.*, 411 S.W.3d 31, 32 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *see also Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229–30 (Tex. 1993) ("Under [Texas Constitution Article II, section 1], courts simply have no jurisdiction to render advisory opinions."). Thus, a dismissal for mootness is not a ruling on the merits, only a judicial recognition that the court lacks jurisdiction under the Texas

---

[15] If only some claims or issues in a case become moot, the case remains justiciable as to the remaining claims or issues that are not moot. *See State ex rel. Best v. Harper*, 562 S.W.3d 1, 6 (Tex. 2018); *see also City of Houston v. Kallinen*, 516 S.W.3d 617, 622 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (explaining case is not moot if some issue remains in controversy).

Constitution to render advisory opinions. *Speer*, 847 S.W.2d at 229; *see also In re Campos*, No. 01-21-00247-CV, 2022 WL 3650129, at *1 (Tex. App.—Houston [1st Dist.] Aug. 25, 2022, orig. proceeding) (mem. op.) ("If a proceeding becomes moot, [we] must dismiss the proceeding." (internal quotations omitted)).

As relief from the trial court's purported error in lifting the abatement of his suit against Houston Foam, Balderas asks this Court to "hold that this case requires abatement pending final judicial resolution of the separate inter-related appeal proceedings [in the judicial review case]." Because the judicial review case has reached its final resolution, an abatement pending resolution is now impossible. *See Harper*, 562 S.W.3d at 6. For this reason, due to mootness, we dismiss for lack of jurisdiction the portion of Balderas's appeal, set forth in his first issue, that complains of the trial court's purported error in lifting the abatement of Balderas's suit against Houston Foam pending final resolution of the judicial review case. *See In re Campos*, 2022 WL 3650129, at *1 ("This Court cannot decide a case that has become moot.").

Sufficiency of Houston Foam's Pleadings

In his second issue, Balderas argues that the trial court erred in granting Houston Foam summary judgment on Balderas's claims because Houston Foam's pleadings did not support its exclusive remedy affirmative defense.

Texas follows a fair-notice standard for pleadings. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 224 (Tex. 2017); *see* TEX. R. CIV. P. 47(a); *Montelongo v. Abrea*, 622 S.W.3d 290, 300 (Tex. 2021). Pleadings give fair notice when an opposing attorney of reasonable competence, with the pleadings before her, can determine the nature and the basic issues of the controversy and the testimony that would probably be relevant. *Myan Mgmt. Grp., L.L.C. v. Adam Sparks Family Revocable Tr.*, 292 S.W.3d 750, 754 (Tex. App.—Dallas 2009, no pet.); *see* TEX. R. CIV. P. 45(b), 47(a). The pleader need only provide fair notice of the claim or defense asserted to give the opposing party enough information to enable him to prepare a defense or response to a defense asserted. *Parker*, 514 S.W.3d at 224–25; *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (orig. proceeding); *Favaloro v. Comm'n of Lawyer Discipline*, 13 S.W.3d 831, 837 (Tex. App.—Dallas 2000, no pet.). Where, as here, no special exceptions were sustained, we construe pleadings liberally in favor of the pleading party. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000); *Com. & Indus. Ins. Co. v. Ferguson-Stewart*, 339 S.W.3d 744, 748 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

Balderas asserts that Houston Foam's pleadings limit it to establishing its entitlement to the exclusive remedy bar through Texas Labor Code chapter 93. Under Texas Labor Code chapter 93, if a temporary employment service elects to

carry workers' compensation insurance, both "the client of the temporary employment service and the temporary employment service are subject to" the exclusive remedy provision. *See* TEX. LAB. CODE ANN. § 93.004(b). Based on the temporary employment service's status as a holder of workers' compensation insurance, the client company derives the right to assert the exclusive remedy provision as an affirmative defense against the temporary employment service's employee who is injured while on assignment to the client company. *See id.*

Contrary to Balderas's assertion, Houston Foam's pleadings were not so limited. Houston Foam alleged that Balderas's claims were "barred under the exclusive remedy provisions" of Texas Labor Code chapter 93 and chapter 408. And because Houston Foam is both the client company of a temporary employment service and a subscriber to workers' compensation insurance in its own right, it was entitled to invoke exclusive remedy as a bar to Balderas's claims either through Texas Labor Code section 408.001 by way of section 93.004(b) or directly through Texas Labor Code section 408.001.[16] *See, e.g.*, *Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 475–76 (Tex. 2005) (client company of temporary employment service

---

[16] Under the TWCA, an employee may have more than one employer, and each employer that subscribes to workers' compensation insurance may independently raise the exclusive remedy provision as a bar to an employee's claims. *Port Elevator–Brownsville, L.L.C. v. Casados*, 358 S.W.3d 238, 242 (Tex. 2012); *Guevara v. WCA Waste Mgmt. Corp.*, No. 01-15-01075-CV, 2017 WL 1483320, at *3 (Tex. App.—Houston [1st Dist.] Apr. 25, 2017, pet. dism'd) (mem. op.).

could assert exclusive remedy defense to claims by temporary employee based on its own workers' compensation insurance coverage); *Robles v. Mt. Franklin Food, L.L.C.*, 591 S.W.3d 158, 166 (Tex. App.—El Paso 2019, pet. denied) (movant under Texas Labor Code section 93.004(b) bears burden to show (1) it was client company of temporary employment service; (2) temporary employment service carried workers' compensation insurance; and (3) worker was employee covered by temporary employment service's workers' compensation insurance coverage).

Houston Foam did not rely on its status as a client of a temporary employment service in moving for summary judgment based on the exclusive remedy provision, so Houston Foam did not need to prove whether Rigoverto was eligible for benefits under the workers' compensation policy held by Port City Staffing or CorTech. Houston Foam moved for summary judgment based on its status as a subscriber in its own right, arguing that it was entitled to judgment as a matter of law on Balderas's negligence and gross-negligence claims because (1) it was Rigoverto's employer for purposes of the TWCA and (2) it was a subscriber to workers' compensation insurance. *See* TEX. LAB. CODE ANN. § 408.001(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.").

Because Houston Foam's pleading of the workers' compensation exclusive remedy as an affirmative defense invoked both Texas Labor Code chapter 93 and chapter 408, its pleadings provided sufficient support for its summary-judgment motion. Accordingly, we hold that the trial court did not err in granting summary judgment in favor of Houston Foam on this ground.

We overrule Balderas's second issue.

Summary-Judgment Evidence

In a portion of his third issue, Balderas argues that the trial court erred in granting Houston Foam summary judgment on Balderas's claims because Houston Foam's summary-judgment evidence was inadmissible.

We review a trial court's decision to admit or exclude summary-judgment evidence for an abuse of discretion. *Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017); *Holland v. Mem'l Hermann Health Sys.*, 570 S.W.3d 887, 893–94 (Tex. App.—Houston [1st Dist.] 2018, no pet.). A trial court abuses its discretion if it acts without reference to any guiding rules or principles. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687 (Tex. 2002). We will not reverse a trial court's erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1); *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001).

In his briefing, Balderas asks this Court to "take judicial notice" of his "eleven pages of objections" to Houston Foam's summary-judgment evidence that he filed in the trial court. (Emphasis omitted.) But an appellant does not satisfy the appellate briefing requirements by simply incorporating by reference into his appellant's brief the argument and analysis that he presented in the trial court. *See Equity Indus. Ltd. P'ship IV v. S. Worldwide Logistics*, No. 14-14-00750-CV, 2016 WL 1267848, at *2 (Tex. App.—Houston [14th Dist.] Mar. 31, 2016, no pet.) (mem. op.); *Allen v. United of Omaha Life Ins. Co.*, 236 S.W.3d 315, 325 (Tex. App.—Fort Worth 2007, pet. denied); *see also Khan v. Safeco Surplus Lines*, No. 14-13-00024-CV, 2014 WL 3907976, at *5–6 (Tex. App.—Houston [14th Dist.] Aug. 12, 2014, pet. denied) (mem. op.) (holding appellant's briefing was inadequate and appellant not permitted to incorporate by reference into his appellant's brief argument and authorities from his summary-judgment response in trial court).

Further, the Texas Rules of Appellate Procedure require that an appellant's brief "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." *See* TEX. R. APP. P. 38.1(i). The failure to provide substantive analysis of an issue or cite appropriate authority waives a complaint on appeal. *See Marin Real Estate Partners, L.P. v. Vogt*, 373 S.W.3d 57, 75 (Tex. App.—San Antonio 2011, no pet.); *Izen v. Comm'n for Lawyer Discipline*, 322 S.W.3d 308, 321 (Tex. App.—Houston [1st Dist.] 2010, pet. denied)

("Issues on appeal are waived if an appellant fails to support his contentions by citations to appropriate authority." (internal quotations omitted)); *Huey v. Huey*, 200 S.W.3d 851, 854 (Tex. App.—Dallas 2006, no pet.); *Cervantes-Peterson v. Tex. Dep't of Family & Protective Servs.*, 221 S.W.3d 244, 255 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also M&E Endeavors LLC v. Air Voice Wireless LLC*, Nos. 01-18-00852-CV, 01-19-00180-CV, 2020 WL 5047902, at *7 (Tex. App.—Houston [1st Dist.] Aug. 17, 2020, no pet.) (mem. op.) ("The briefing requirements are mandatory . . . .").

Here, Balderas, in his appellate briefing related to his complaint about Houston Foam's summary-judgment evidence, fails to cite to appropriate authority and fails to explain how the trial court's ruling on any of his objections probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 38.1(i) (appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citation to authorities"), 44.1(a); *see also Scudday v. King*, No. 04-20-00562-CV, 2022 WL 2230730, at *2 (Tex. App.—San Antonio June 22, 2022, pet. filed) (mem. op.) (holding complaint trial court erred in overruling appellant's objections to appellees' summary-judgment evidence waived where appellant, in his briefing, did not explain how trial court's error in overruling appellant's objections probably caused rendition of improper judgment); *In the Interest of G.P.*, No. 01-16-00346-CV, 2016 WL 6216192, at *24–25 (Tex. App.—

Houston [1st Dist.] Oct. 25, 2016, no pet.) (mem. op.) (appellant waived complaint trial court erred in admitting certain evidence because he failed to provide explanation, analysis, and citation to appropriate legal authority to explain how purported error probably caused rendition of improper judgment).

Thus, we hold that Balderas has waived this portion of his third issue because it is inadequately briefed. *See Strange v. Cont'l Cas. Co.*, 126 S.W.3d 676, 677–78 (Tex. App.—Dallas 2004, pet. denied) (appellate court cannot remedy deficiencies in appellant's brief and argue his case for him).

Texas Labor Code Chapter 408

In another portion of his third issue, Balderas argues that the trial court erred in granting Houston Foam summary judgment on Balderas's claims because it did not meet its burden to prove it was entitled to judgment as a matter of law based on Texas Labor Code chapter 408's exclusive remedy provision.

We review a trial court's decision to grant summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In conducting our review, we take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Valence Operating*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215. If a trial court grants summary judgment without specifying the grounds for granting the motion,

we must uphold the trial court's judgment if any of the asserted grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

To prevail on a matter-of-law summary-judgment motion, the movant has the burden of establishing that it is entitled to judgment as a matter of law and there is no genuine issue of material fact. *See* TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When a defendant moves for a matter-of-law summary judgment, it must either: (1) disprove at least one essential element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of its affirmative defense, thereby defeating the plaintiff's cause of action. *See Cathey*, 900 S.W.2d at 341; *Yazdchi v. Bank One, Tex., N.A.*, 177 S.W.3d 399, 404 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Once the defendant meets its burden, the burden shifts to the plaintiff, the non-movant, to raise a genuine issue of material fact precluding summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *Transcon. Ins. Co. v. Briggs Equip. Tr.*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The evidence raises a genuine issue of fact if reasonable and fair-minded fact finders could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

Houston Foam, in its summary-judgment motion, argued that it was entitled to judgment as a matter of law on Balderas's negligence and gross-negligence claims because the exclusive remedy provision of the TWCA barred Balderas's claims. Thus, we look to the statute to determine whether Houston Foam satisfied its summary-judgment burden.

Under Texas Labor Code chapter 408, if a Texas employer is a workers' compensation subscriber, the benefits provided under workers' compensation insurance are the exclusive remedy for an employee injured on the job. *See* TEX. LAB. CODE ANN. § 408.001(a); *Port Elevator–Brownsville, L.L.C. v. Casados*, 358 S.W.3d 238, 241 (Tex. 2012). As previously noted, an employee may have more than one employer within the meaning of the TWCA, and each employer that subscribes to workers' compensation insurance may raise the exclusive remedy provision of Texas Labor Code chapter 408 as a bar to the employee's claims. *See Casados*, 358 S.W.3d at 242; *Guevara v. WCA Waste Mgmt. Corp.*, No. 01-15-01075-CV, 2017 WL 1483320, at *4 (Tex. App.—Houston [1st Dist.] Apr. 25, 2017, pet. dism'd) (mem. op.); *Casados*, 358 S.W.3d at 241. If an employee of a temporary staffing agency is assigned to work for a client company and the client company has the right to control the manner and details of the employee's work, then the employee is the employee of both the temporary staffing agency and the client company. *See Casados*, 358 S.W.3d at 242; *Guevara*, 2017 WL 1483320,

at*4. Thus, if the employee is injured while working under the client company's direct supervision, he "can pursue workers' compensation benefits from either (and be subject to the exclusive remedy provision as to both) if each provided coverage." *Mosqueda v. G & H Diversified Mfg., Inc.*, 223 S.W.3d 571, 582 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

To be entitled to summary judgment under Texas Labor Code chapter 408 based on a direct employer-employee relationship, a client company of a temporary employment service must prove as a matter of law that: (1) the client company was the worker's employer within the meaning of the TWCA and (2) the client company was subscribed to workers' compensation insurance at the time of the worker's injury. *See W. Steel Co. v. Altenburg*, 206 S.W.3d 121, 123 (Tex. 2006). In determining whether the client company was the worker's employer, courts "consider traditional indicia, such as the exercise of actual control over the details of the work that gave rise to the injury." *Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 476 (Tex. 2005). "The type of control normally exercised by an employer includes determining when and where to begin and stop work, the regularity of hours, the amount of time spent on particular aspects of work, the tools and appliances used to perform the work, and the physical method or manner of accomplishing the end result." *Phillips v. Am. Elastomer Prods., L.L.C.*, 316 S.W.3d

181, 187 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); *see also Guevara*, 2017 WL 1483320, at *4.

To prove that Rigoverto was its employee at the time of his injury, Houston Foam relied on the statements in Balderas's live pleadings that Houston Foam had assigned Rigoverto the task he was performing, instructed him how to use a specific piece of Houston Foam's equipment, and provided him with the materials necessary to perform the task. In his appellant's brief, Balderas acknowledges that Port City Staffing sent Rigoverto to a temporary assignment with Houston Foam, and he "was working at [Houston Foam's] warehouse" when he "was injured while placing foam scraps into an industrial [plastic] grinder located in that warehouse." These undisputed facts show that Houston Foam exercised actual control over the details of Rigoverto's work at the time he was injured. *See Garza*, 161 S.W.3d at 476 (where undisputed evidence showed that at time worker was injured, he was working at client company's premises and in furtherance of client company's day-to-day business, and details of work that caused his injury were specifically directed by client company, client company was injured worker's employer for purposes of exclusive remedy provision).

Balderas asserts that the CSA, which stated that Rigoverto was the employee of Port City Staffing, as well as other documents that identify Port City Staffing as Rigoverto's employer, raised a fact issue as to whether Houston Foam could claim

Rigoverto as its employee for purposes of Texas Labor Code chapter 408's exclusive remedy provision. But in dual-employment cases like this one, "the fact that the defendant did not directly employ the worker provided by the staffing agency" does "not factor prominently in the analysis," nor does "the result turn on the contractual relationship between the staffing agency and its client." *Waste Mgmt. of Tex., Inc. v. Stevenson*, 622 S.W.3d 273, 279 (Tex. 2021). The focus does not belong on "the legal question of who had the contractual right to control the plaintiff's work," but instead on "the factual question of who exercised the right to control as a practical matter in the course of the [worker's] daily work." *Id.* Here, the facts show that, at the time Rigoverto was injured, Houston Foam had the right to control the details of his work. The reference in the CSA and other documents to Port City Staffing as Rigoverto's employer does not conflict with that evidence.

Balderas also argues that Houston Foam was not entitled to summary judgment as a matter of law because it did not attach a copy of its workers' compensation policy to its summary-judgment motion. The evidence of its status as a workers' compensation insurance subscriber that Houston Foam attached to its motion consisted of an affidavit and supplemental affidavit executed by Bernaldez, Houston Foam's human resources manager, which were accompanied by a certificate of insurance showing that Houston Foam carried workers' compensation insurance and coverage verification from the TDI. This evidence was sufficient to

prove Houston Foam's subscriber status as a matter of law. *See Guevara*, 2017 WL 1483320, at *3 (company not required to produce actual workers' compensation policy and could prove subscriber status with other evidence, such as affidavits); *Price v. Uni–Form Components Co.*, No. 14-11-00902-CV, 2012 WL 2929493, at *3–4 (Tex. App.—Houston [14th Dist.] July 19, 2012, no pet.) (mem. op.) (employer was not required to produce copy of policy to prove subscriber status where employer had already produced copy of certificate of insurance reflecting that workers' compensation insurance covered employees on date of employee's injury).

Houston Foam proved as a matter of law that, at the time of Rigoverto's injury, it was his employer and a workers' compensation subscriber that was entitled to the protection of the exclusive remedy provision of Texas Labor Code chapter 408. Thus, we hold that the trial court did not err in granting Houston Foam summary judgment.

We overrule this portion of Balderas's third issue.

Constitutional Claims

In his fourth issue, Balderas argues that the trial court erred in granting Houston Foam summary judgment on Balderas's claims because doing so violated his rights under the open courts, and equal protection, and due course of law

provisions of the Texas Constitution[17] and the due process and equal protection clauses of the United States Constitution[18] as Houston Foam "did not take any steps to alert [Balderas] that it would claim him as 'covered' under its workers' compensation policy."

As a private actor, Houston Foam owed Balderas no duty under the above constitutional provisions. "[E]qual protection and due process challenges require state action and must be brought against state actors." *Johnson v. State Farm Mut. Auto. Ins. Co.*, 520 S.W.3d 92, 101 (Tex. App.—Austin 2017, pet. denied); *see also Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (action inhibited by first section of federal constitution's fourteenth amendment "is only such action as may fairly be said to be that of the States"); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 90–91, 93 (Tex. 1997) (holding state action is required before litigant can maintain claim under Texas Constitution article I, so suit could not be maintained against defendant that was not state actor).

Balderas also asserts that certain actions by Houston Foam violated certain provisions of the Texas Administrative Code, but he does not explain how those provisions would give him a private right of action against Houston Foam. *Cf. Bickham v. Dallas Cnty.*, 612 S.W.3d 663, 670 (Tex. App.—Dallas 2020, pet.

---

17 *See* TEX. CONST. art. 1, § 13.

18 *See* U.S. CONST. amend. IV.

denied) ("The fact that a statute has been violated and some person has been harmed does not automatically give rise to a private cause of action in favor of that person."). Balderas has failed to identify any legal support for his constitutional complaints and his complaints related to the Texas Administrative Code, and they cannot provide a basis for reversal for the trial court's judgment. *See* TEX. R. APP. P. 38.1(i).

Thus, we hold that the trial court did not err in granting Houston Foam summary judgment because of Balderas's constitutional and Texas Administrative Code complaints.

We overrule Balderas's fourth issue.

Conclusion

We dismiss for lack of jurisdiction the portion of Balderas's appeal seeking to challenge the trial court's lifting of the abatement of Balderas's suit against Houston Foam. We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Justices Kelly, Countiss, and Rivas-Molloy.