COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-0423

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

EDDIE CREWS,

PLAINTIFF-APPELLANT,

V.

FREEMAN ROOFING, INC.,
ABC INSURANCE COMPANY,
M.M. SCHRANZ ROOFING, INC.,
TRANSCONTINENTAL INSURANCE COMPANY
AND TRAVELERS INDEMNITY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Eddie Crews appeals the grant of summary judgment to M. M. Schranz Roofing, Inc. (Schranz), which effectively dismissed his entire case. Crews argues that the trial court erred because Freeman Roofing, Inc. (Freeman), the company that lent Crews to Schranz, was not a temporary help agency and, thus, Schranz was not immune from suit pursuant to WIS. STAT. § 102.29(6).[1] Crews also maintains that he was not a "loaned employee" when Freeman sent him to Schranz; thus, Schranz is not entitled to the "loaned employee" immunity found in § 102.29(7). While we affirm the trial court, we do so for another reason than that stated by the trial court.[2] We decline to address the question of whether immunity was provided Schranz under § 102.29(6). We are, however, satisfied that Crews met the test to qualify as a "loaned employee" pursuant to § 102.29(7). As a consequence, Schranz is immune from Crews's suit.

I. BACKGROUND.

¶2 Eddie Crews, an employee of First Choice Temporary Employment Service (First Choice), was assigned to work for Freeman. Freeman was a subcontractor for Schranz, which had a contract to repair the roof of a local public school. Freeman sent Crews to work on Schranz's roofing project. First Choice paid Crews's wages. Freeman compensated First Choice for Crews's services, and Schranz, in turn, paid Freeman for Crews's labor. On May 22, 1995, Crews

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985) (an appellate court may affirm a trial court's correct ruling irrespective of the trial court's rationale); ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if this court's decision on one point disposes of the appeal, we need not decide other issues raised).

was climbing a 36-foot ladder at the Schranz job site when he fell, fracturing his neck. As a result of his injury, he was paralyzed from the neck down.

¶3 First Choice's workers compensation insurer, Travelers Indemnity Company (Travelers), paid Crews's medical expenses and lost wages as a result of the accident. Crews commenced suit against Freeman, Schranz, and Schranz's liability insurance carrier, Transcontinental Insurance Company. Travelers was also named in the suit as the subrogated workers' compensation carrier. Crews alleged that Freeman and Schranz were negligent because of various safety statute violations. Subsequently, Freeman was dissolved and it did not participate in the litigation.

¶4 Schranz and its insurance company filed an answer and also brought a summary judgment motion. In its motion, Schranz argued that it was immune from suit pursuant to WIS. STAT. § 102.29(6) (which prohibits an employee of a temporary help agency from maintaining a tort action against an employer who compensates the employee's temporary help agency for the employee's services), and pursuant to § 102.29(7) (which prohibits a tort action against a company that loans one of its employees to another employer). The trial court granted Schranz's motion, finding that Freeman was acting as a temporary help agency when it sent Crews to work for Schranz. The trial court declined to address the second issue.

II. ANALYSIS.

¶5 In an appeal from the entry of summary judgment, this court reviews the record *de novo*, applying the same standard and following the same methodology required of the trial court under WIS. STAT. § 802.08. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). This case requires us to apply the test for a "loaned employee" found in ***Seaman Body***

Corporation v. Industrial Commission, 204 Wis. 157, 235 N.W. 433 (1931): "The application of the *Seaman* test to undisputed facts has traditionally been viewed as a question of law. This court reviews questions of law without deference to the lower courts." ***Bauernfeind v. Zell***, 190 Wis. 2d 701, 714, 528 N.W.2d 1 (1995) (citation omitted).

¶6 Crews first asserts that summary judgment was inappropriate because there were disputed material facts. We disagree. Our review of the record reveals there are no disputed facts; the dispute only requires us to apply the facts to the law.[3] Crews's mere assertion in his brief that there are disputed facts is not determinative.

¶7 As noted, WIS. STAT. § 102.29(7) provides immunity from tort suit by an employee if the employee was a "loaned employee." Section 102.29(7) reads: "No employe who is loaned by his or her employer to another employer and who makes a claim for compensation under this chapter may make a claim or maintain an action in tort against the employer who accepted the loaned employe's services." Crews argues that the provision of the Workers Compensation Law granting immunity to employers with "loaned employees" does not apply because he never consented to work for Schranz. We disagree.

¶8 The test for determining whether one is a "loaned employee" found in ***Seaman*** is longstanding. The supreme court set out the test in ***Borneman v.***

[3] As provided in WIS. STAT. § 802.08(3): "When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party."

Corwyn Transport, 219 Wis. 2d 346, 580 N.W.2d 253 (1998). The test explains that:

> "The relation of employer and employee exists as between a special employer to whom an employee is loaned whenever the following facts concur: (a) Consent on the part of the employee to work for a special employer; (b) Actual entry by the employee upon the work of and for the special employer pursuant to an express or implied contract to do so; (c) Power of the special employer to control the details of the work to be performed and to determine how the work shall be done and whether it shall stop or continue."

Id. at 353 (citation omitted).

¶9 "These three elements and the following four questions are closely related, but 'most cases interpreting and applying the *Seaman* test have emphasized the four vital questions rather than the three elements.'" ***Powell v. Milwaukee Area Technical Coll. Dist. Bd.***, 225 Wis. 2d 794, 803, 594 N.W.2d 403 (Ct. App. 1999) (citation omitted).

¶10 The four questions to be answered in determining whether the "loaned employee" immunity applies are also found in ***Seaman***:

> "The vital questions in controversies of this kind are: (1) Did the employee actually or impliedly consent to work for a special employer? (2) Whose was the work he was performing at the time of injury? (3) Whose was the right to control the details of the work being performed? (4) For whose benefit primarily was the work being done?"

Seaman, 204 Wis. at 163.

¶11 Here, the dispute lies with whether the consent element of the ***Seaman*** test was met, and whether the question—Did [Crews] actually or

impliedly consent to work for a special employer [Schranz]?—should be answered in the affirmative.[4] We are satisfied that Crews consented, although impliedly, to work for Schranz.

¶12 The record is undisputed that Crews was First Choice's employee, which in turn assigned him to Freeman, which sent Crews to work for Schranz. First Choice paid Crews's salary. Freeman paid First Choice for Crews's services and Freeman was compensated by Schranz for Crews's labor. Thus, an employer/special-employee relationship existed between Freeman and Schranz.

¶13 Although Crews now argues in his brief that he never consented to work for Schranz, his assertion is contradicted by the record. Crews's deposition testimony is illustrative. During his deposition, Crews explained that he worked for Schranz because Freeman had the contract to supply Schranz with minority workers to meet Schranz's contract terms with the Milwaukee Public Schools.[5] Crews also noted that he had worked for another company who supplied minority workers to a larger concern. These statements established that Freeman was familiar with the arrangement between companies that had one company sending its workers to another company in order to meet minority worker quotas.

¶14 At his deposition, Crews also admitted that he had been working for Schranz for several weeks before he was injured, and during that entire period of time he never objected to or complained about working for Schranz. Further,

[4] We have assumed that Crews contests only the first element of the ***Seaman*** test because his brief makes no mention of the remaining elements of the test. Assertions not discussed are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

[5] We note that in the transcript, the court reporter mistakenly believed Crews said "Binardi" instead of the word "minority."

Crews related that while at the Schranz work site, he followed the directions of Schranz's foreman and worked side-by-side with other Schranz employees. In fact, Crews revealed that Freeman was not usually present at the Schranz job site. Thus, we conclude, based upon these facts, that Crews impliedly consented to work for Schranz. Crews knew of the arrangement between the companies that sent him to work for Schranz at Schranz's work site with Schranz's employees. Also, he had worked there for several weeks before his accident, and during that time he never told Freeman or anyone else that he refused or objected to working for Schranz. Moreover, our review of the record reveals no evidence to support Crews's belated allegation that he did not consent to work for Schranz.[6]

¶15 Citing ***Ryan, Inc. v. DILHR***, 39 Wis. 2d 646, 159 N.W.2d 594 (1968), Crews maintains that he did not understand the fact that he was "loaned" or know that he had to agree to the temporary relationship. However, his assertion that he had no understanding of the fact that Freeman loaned him to Schranz, and that he did not understand that he agreed to work for Schranz, is, again, undercut by the record. In his deposition, Crews recounted that the "…first time I started working with Schranz, is he (Freeman) had the minority contract." This statement makes it obvious that Crews was aware of the relationship between Freeman and Schranz. Crews also related that while he had received pay checks directly from Freeman and Schranz in the past, he was receiving a paycheck from First Choice at the time of his injury. Therefore, he knew he was not a Schranz employee and

[6] Compare the facts here with those in ***Borneman v. Corwyn Transport, Ltd.***, 219 Wis. 2d 346, 360, 580 N.W.2d 253 (1998). There, "the two employers did not have a prior arrangement or understanding to loan [any employees] to Major Industries to load the trailer. [Borneman's employee's] job as truck driver did not require him to help load the trailer. He was not compensated by either employer for helping to load the trailer … (and he) was paid only for delivery of the load to the intended destination." ***Id.*** at 360. The court concluded that Borneman's employee was not a "loaned employee" when the accident occurred. ***Id.*** at 349.

that he was an employee of a temporary help agency. Thus, he had no obligation to work for Schranz and he could have easily refused or declined to work there. Crews's willingness to continue working for Schranz is evidence of his consenting to being loaned by Freeman to Schranz.

¶16 In sum, the record is uncontroverted that Crews was aware of the fact that Freeman supplied other companies with minority workers in order to fulfill the minority worker provisions in their contracts and he knew Freeman had the minority contract with Schranz to supply minority workers. Further, Crews voluntarily consented to work for Schranz. By his conduct, Crews impliedly consented to be loaned by Freeman to Schranz to fulfill its minority contract requirements. Consequently, all the elements of the ***Seaman*** test have been satisfied. As a result, Schranz is entitled to the immunity for suit found in WIS. STAT. § 102.29(7), because Crews was a loaned employee.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(5).