COURT OF APPEALS
DECISION
DATED AND RELEASED

March 11, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0414

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

Enrique Fuentes, Teresa Fuentes and Bucyrus-Erie Company,

Plaintiffs-Appellants,

v.

Federal Insurance Company, MTR Ravensburg, Inc. and George Sauter,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed*.

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

PER CURIAM. Enrique Fuentes appeals from a summary judgment dismissing his negligence claim against MTR Ravensburg Inc. (MTR), Federal Insurance Company, and George Sauter. Fuentes claims the trial court erred in concluding that his action was barred by the exclusive remedy

provision of the Worker's Compensation Act. Because Sauter occupied a "loaned employee" status, we affirm.

I. BACKGROUND

In August 1992, Bucyrus-Erie Company (BE) requested that MTR provide it with the services of an MTR employee, Sauter, who was a road technician. As a road technician, Sauter's responsibilities included the installation of machinery, and its inspection and adjustment. BE needed Sauter's assistance to perform maintenance on two vertical boring mills located on BE's premises. MTR paid Sauter a salary and benefits. The work purchase order executed between BE and MTR provided that BE would pay MTR for Sauter's labor and expenses. Sauter began his work at BE on October 12, 1992, and completed it on October 23, 1992.

BE assigned Fuentes, a BE maintenance mechanic, to assist Sauter in his work at BE. Fuentes had been employed by BE for thirty years. On October 16, 1992, Sauter was working on a ladder provided by BE when it slipped out from under him. He was left dangling from a beam by one hand. Fuentes grabbed for Sauter in an attempt to break his fall. In the process, Sauter fell on Fuentes injuring him. Fuentes filed suit against Sauter, MTR and Federal Insurance Company (MTR's insurance carrier), alleging that Sauter negligently placed the ladder, causing his injuries. The defendants moved for summary judgment claiming that, because Sauter was a "loaned employee," Fuentes's exclusive remedy for the injuries he received was worker's compensation, pursuant to § 102.03(2), STATS., of the Wisconsin Worker's Compensation Act. The trial court agreed and granted summary judgment dismissing Fuentes's complaint. Fuentes now appeals.

II. ANALYSIS

When a trial court's application of summary judgment procedure and its conclusion of law are challenged by appeal, we independently review the trial court's action keeping in mind the well recognized rubrics of summary

judgment procedure.[1] *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987).

Fuentes argues that the trial court erred in granting summary judgment because Sauter was not a loaned employee, and therefore recovery should not be limited to worker's compensation. He proffers two reasons to support this assertion: (1) the contract between MTR (Sauter's general employer) and BE demonstrates the parties' intentions to preclude labeling Sauter as a loaned employee; and (2) Sauter does not meet the four-part-loaned-employee test enunciated in ***Seaman Body Corp. v. Industrial Comm'n of Wisconsin***, 204 Wis. 157, 235 N.W. 433 (1931).

MTR and Sauter respond that because Sauter was a loaned employee, he and Fuentes were actually co-employees at the time of the accident; therefore, Fuentes's only recourse for his injuries is worker's compensation. We address both of Fuentes's contentions in turn.

A. Contractual Relationship.

Fuentes first claims that by the terms of the purchase of services contract entered into between BE and MTR, the intention of the parties was to make certain that no "loaned employee" argument could be raised and that all the employees of each company maintained their original employment identity. Fuentes reaches this conclusion by his analysis and interpretation of portions of several documents, the contents of which no one disputes: MTR's document entitled "CONDITIONS GOVERNING SERVICE CHARGES FOR SERVICE ENGINEERS IN CUSTOMER'S PLANTS WITHIN THE UNITED STATES" and paragraph 10 of the CONDITIONS section of the contract.[2]

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[1] Fuentes suggests that material issues of fact exist, but does not develop the assertion. Moreover, he does not argue that summary judgment was not warranted. Therefore, we deem this contention waived. ***Reiman Assocs. v. R/A Advertising***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981).

[2] Paragraph 10 of the Conditions agreement states:

As to the former document, Fuentes points to: (1) section IV providing that the billing charge by MTR begins to accrue when its service engineer leaves home base and ends when he or she returns to MTR's plant; (2) section V providing that all travel, meals and lodging expenses of the service person shall be charged to the customer until the person returns to MTR's plant; and (3) section VII providing that MTR assumes responsibility under its insurance coverage for injuries incurred by its employees in customer plants.

As to the latter document, Fuentes first refers to the last sentence which states "[i]n no event shall any person furnished by Seller hereunder, with

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WORK ON BUYER'S PREMISES-WARRANTY-INDEMNITY:-If this order requires that Seller perform work on Buyer's premises, Seller, in consideration of this order, agrees to indemnify and hold harmless Buyer against any and all claims of any nature whatever relating to property damage, injuries or occupational diseases (including death resulting therefrom) to Seller, any subcontractor of Seller or any employee of either, or to anyone if caused by Seller, any subcontractor of Seller or any employee of either, arising in connection with such work on Buyer's premises or relating to unemployment compensation measured by or based upon employment in connection therewith; and Seller agrees to reimburse Buyer for payment made by Buyer on account of any claim made against Buyer in this connection. Seller also agrees to supply Buyer, before work is started, with Buyer's form of Certificate of Insurance evidencing limits of liability and insurance companies acceptable to Buyer covering General Liability, Automobile Liability, Employer's Liability and Workmen's Compensation, and to maintain such insurance in effect throughout the duration of this order, and for such period of time thereafter as Buyer may reasonably require. In addition to all other warranties contained herein, Seller warrants that all work performed hereunder shall comply with all applicable safety and other laws, rules, and regulations, as amended from time to time, including but not limited to the Occupational Safety and Health Act of 1970. Seller shall insure that his employees and representatives, and employees representatives of any subcontractor of Seller, shall learn and comply with Buyer's security and safety rules. The latter may cover, but shall not be limited to, the use of hard hats, safety glasses and safety shoes. In no event shall any person furnished by Seller hereunder, with or without charge, be deemed to be an agent or employee of Buyer.

or without charge, be deemed to be an agent or employee of Buyer." He then asserts that the terms of paragraph 10 consist of a comprehensive indemnification agreement accepting responsibility for injuries to persons on a job site. This indemnification provision, Fuentes reasons, constitutes a waiver of immunity from suit afforded under the Worker's Compensation Act whether there is an express waiver of immunity or not.

The application of the Wisconsin's Worker's Compensation Act to an incident in controversy is determined by examining the circumstances in which workers find themselves giving rise to the claim involved. It is generally recognized that what a worker is represented to be is not controlling. ***Marlin Elec. Co. v. Industrial Comm'n***, 33 Wis.2d 651, 660, 148 N.W.2d 74, 79 (1967) (citing ***Scholz v. Industrial Comm'n***, 267 Wis. 31, 38, 64 N.W.2d 204, 208 (1954)). Thus, in this case, the actual nature of Sauter's relationship to BE is conclusive. ***Meka v. Falk Corp.***, 102 Wis.2d 148, 156, 306 N.W.2d 65, 70 (1981).

Fuentes responds to this body of authority by emphasizing the nature of the indemnification provisions of paragraph 10 of the order contract. He further refers to ***Schaub v. West Bend Mut.***, 195 Wis.2d 181, 536 N.W.2d 123 (Ct. App. 1995) and ***Larsen v. J.I. Case Co.***, 37 Wis.2d 516, 155 N.W.2d 666 (1968), which stand for the proposition that, "the no liability rule of an employer over and above that imposed by the Worker's Compensation Act does not apply in the case of an express agreement for indemnification."[3]

[3] In ***Larson v. J.I. Case Co.***, 37 Wis.2d 516, 155 N.W.2d 666 (1968), the supreme court reversed a summary judgment dismissing a general contractor's cross complaint against his subcontractor seeking indemnity based on a contract provision. The subcontractor's employee, after collecting worker's compensation benefits, sued the general contractor alleging negligence and a violation of the safe place statute. The court ruled that summary judgment must be denied because an issue of fact remained as to the negligence of the indemnitee and indemnitor. ***Id.*** at 522, 155 N.W.2d at 669.

In ***Schaub v. West Bend Mut.***, 195 Wis.2d 181, 536 N.W.2d 123 (Ct. App. 1995), we reversed the trial court's dismissal of a third party complaint of a general contractor based upon an indemnity agreement because the agreement need not specifically say that the subcontractor waives immunity from suit under the Worker's Compensation Act. In the agreement, the subcontractor promised to save harmless the contractor from any claims and indemnify it for any damage or liability incurred by the general contractor for personal injury arising or alleged to have arisen whether directly or

We find no fault with Fuentes's assertion that immunity from suit enjoyed by employers pursuant to our Worker's Compensation Act may be waived. We do, however, reject the application of this principle and the cases cited above as providing a basis for the abolition of MTR's immunity in the context presented. The contractual relationship that existed was between MTR and BE. Clearly it was designed to protect BE from MTR's actions while on the premises of BE. MTR committed itself to indemnify BE for the adverse consequences of any negligent activity that might occur. It was a bilateral contractual relationship containing no features of a third-party beneficiary contract. It granted the right of indemnity to BE alone, making no reference to any of BE's employees.

In contrast, ***Larsen***, ***Schaub***, and the cases discussed in those decisions all involve actions by the indemnitees who are the parties named in the indemnity provision. As explained by counsel for Sauter, these cases have carved out a narrow exception and provided the rationale for suits against the indemnitor thereby "allowing the indemnitor's employee to not only receive worker's compensation benefits but also to ... bring a suit against their own employer." Here the defining difference is that BE is not a proponent of a claim under the indemnity agreement and Fuentes is not an employee of the indemnitor, MTR. In essence, Fuentes has filed a claim against MTR grounded in negligence and asserts that the indemnification agreement between BE and MTR "somehow" alters the exclusive remedy provision of the Worker's Compensation Act. We have not been presented with any case authority to support such a position. Moreover, we are not persuaded by Fuentes's leap in logic.[4]

B. Seaman "Loaned Employee" Test.

Next, Fuentes claims that he can maintain his third-party action because Sauter was not a "loaned employee" under the four-pronged test established in

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indirectly on account of or in connection with any work done by the subcontractor. ***Id.*** at 184, 536 N.W.2d at 125.

[4] Fuentes also claims that Sauter was an independent contractor and therefore not a co-employee. This argument, however, is not adequately developed and, therefore, we decline to address it. *See* ***Reiman Assocs.***, 102 Wis.2d at 306 n.1, 306 N.W.2d at 294 n.1.

Seaman to make such a determination. In ***Seaman***, our supreme court enunciated the following criteria to ascertain whether an employee acquired the status of a "loaned employee:" (1) Did the employee (Sauter) actually or impliedly consent to work for the special employer (BE)? (2) Was the employee performing the special employer's work at the time of the injury? (3) Did the special employer have the right to control the details of the work being performed? (4) Was the work of the employee primarily for the benefit of the special employer? *See* ***Seaman***, 204 Wis. at 163, 235 N.W. at 436.

The application of the judicially crafted four-part ***Seaman*** test to undisputed facts and undisputed inferences from the facts to determine the relation between the loaned employee and the borrowing employer has traditionally been viewed as one of law subject to independent review on appeal. ***Gansch v. Nekoosa Papers, Inc.***, 158 Wis.2d 743, 753, 463 N.W.2d 682, 686 (1990). The application of the statutory test to undisputed facts and undisputed inferences from the facts is also a matter of law to be similarly examined. We now examine the facts in the record relevant to the application of the ***Seaman*** test.

1. Consent.

The first prong requires us to analyze whether Sauter consented to work for BE. Fuentes argues that the record is void of any facts which would suggest that Sauter consented to work for BE. In support of this assertion he argues that: (1) Sauter went to BE by order of MTR as a road service technician; (2) MTR paid his salary and benefits; and (3) BE provided him with no directions regarding the job MTR ordered him to perform under the purchase order. Fuentes also claims that his position is supported by the fact that Sauter was in charge of the details of the work he performed adjusting and aligning BE's vertical boring mill machines. The record, however, compels a different conclusion.

Consent to enter the employment of a special employer may be implied from the employees acceptance of the special employer's control and direction. ***Springfield Lumber, Feed & Fuel Co. v. Industrial Comm'n***, 10 Wis.2d 405, 411, 102 N.W.2d 754, 758 (1960). Standing alone, the right of control by the special employer is insufficient to support the inference that the employee implicitly

consented to enter the employment of the special employer. ***Rhinelander Paper Co. v. Industrial Comm'n***, 206 Wis. 215, 239 N.W. 412 (1931).

When Sauter was sent to BE by MTR at BE's request, he was to report to BE supervisor Pete Golden, which he did. He understood he was to receive instructions from Golden. BE set his work hours, controlled how long he would remain on the job and when he would be released. BE set the terms and conditions of his work schedule. He spent eleven days in BE's plant under BE's direction. He neither objected to his working conditions nor attempted to alter them to suit his own needs.

From this review of the pertinent facts, we conclude that Sauter approved of his service assignment and clearly understood that the continued discharge of his duties was directly dictated by BE's supervisor, Golden. Other than providing Sauter to BE, MTR in no way was involved with controlling his work product. Therefore, at the very least, Sauter implicitly consented to work for BE.

2. Performing Special Employer's Work.

The second prong requires us to determine whether Sauter was performing BE's work at the time of the injury to Fuentes. Sauter was hired through MTR for his expertise in aligning and adjusting their vertical boring mills. At the same time, BE assigned Fuentes to Sauter to assist him and to show Fuentes how to perform the service work so that in the future Fuentes could perform the same work. From the record we can discern no dispute that Sauter was performing BE's work and conclude that such was the case.

3. Control Over Details of Work Performed.

The third prong requires us to determine whether BE had the right to control the details of work performed by Sauter. Fuentes claims that the only control BE exercised over Sauter was to whom he reported for work, discussions with certain BE personnel, his work hours and providing him with certain work tools. He asserts that Sauter's work was not dependent on any specific instructions from BE.

His position cannot withstand even modest scrutiny. Sauter understood he was to receive instructions from BE's supervisor, Golden. Golden directed him to inspect the two vertical mills to bring them "back to specs." How close they were to be brought "back to specs," however, was BE's decision. Sauter was to stay on the job site until BE was satisfied that the service order had been adequately completed. Once he was on the job, he was to follow any instructions given by BE. MTR supplied no instructions as to how his assignment was to be performed. Sauter was required to submit daily reports and recommendations to Golden who would then direct him as to what further work was needed. Sauter was to do no work without BE's approval. There is no question that "how" the service was to be performed was within the expertise of Sauter but "what" was to be done and "when" was in the total control of BE. We deem this prong of the test to be satisfied.

4. For Whose Benefit Was Work Performed.

The fourth and final prong requires us to determine whether the service performed by Sauter was done primarily for the benefit of BE. Succinctly stated, if Sauter was not providing a service for BE, he had no reason to be at the plant site. BE had solicited his services from MTR because of his ability to balance, align, and otherwise adjust vertical boring mills. Most assuredly, it was MTR's work that he was performing as a road service technician but, without a doubt, the service rendered was for the benefit of BE. No one disputes this conclusion.

From this review and application of the ***Seaman*** test we hold, as a matter of law, that Sauter was a loaned employee of BE, which rendered Fuentes's status that of a co-employee, thereby barring the latter's claim by the exclusive remedy rule of the Wisconsin Workers' Compensation Act.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.