NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOSE P. FRANCO, Plaintiff and Appellant, v. WEST COAST PIPE INSPECTION AND MAINTENANCE, INC. et al., Defendants and Respondents.	F068770 (Super. Ct. No. CV-274779) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Lorna H. Brumfield, Judge.

Rodriguez & Associates, Daniel Rodriguez, Joel T. Andreesen, Martha J. Rossiter; Esner, Chang & Boyer, Stuart B. Esner and Holly N. Boyer for Plaintiff and Appellant.

Clifford & Brown, Michael L. O'Dell and Joseph A. Werner for Defendants and Respondents.

-ooOoo-

---

[*] Before Levy, Acting P.J., Detjen, J. and Peña, J.

Jose P. Franco appeals the grant of summary judgment to West Coast Pipe Inspection and Maintenance, Inc. (West Coast) and Jose Melgoza on his tort claims for personal injuries received while he was working for West Coast. Franco challenges the trial court's determination that West Coast was his special employer and therefore workers' compensation is Franco's exclusive remedy. We will affirm.

BACKGROUND

Franco was employed by tempSERVE, a temporary staffing agency. In July 2009, Franco was assigned to work for West Coast as a general laborer. The tempSERVE dispatcher told Franco he would be assisting a West Coast forklift driver. Franco could have rejected this assignment.

At West Coast, Franco reported to Ever Chacon, a yard supervisor. Chacon told Franco that he would be assigned to Melgoza, a forklift driver, to help load and unload trailers with pipe. Franco's job was to set four-by-four timbers on the trailers and nail chocks to the timbers. He also cleaned debris out of the roadways. Franco was instructed on how to do the job by Chacon and Melgoza. Franco also made new chocks as needed with a table saw. A West Coast employee showed Franco how to make the chocks.

Every day when Franco reported to work at West Coast, he would locate Melgoza. Melgoza would then give Franco their lineup for the day. Franco spent the work day with Melgoza, receiving instructions from Melgoza regarding their tasks. He was never instructed or supervised by anyone from tempSERVE. Although West Coast could not fire Franco, West Coast could remove him from the job at any time.

West Coast provided the hammer and table saw Franco used to do his job. However, Franco and tempSERVE provided Franco's safety equipment, i.e., hard hat, gloves, eye protection and steel toed boots.

On September 28, 2009, a pipe struck Franco injuring his foot and knee. Appellant's medical bills and disability payments were paid by workers' compensation insurance.

Franco filed the underlying complaint for negligence against West Coast and Melgoza. West Coast and Melgoza moved for summary judgment on the ground that West Coast was Franco's special employer and therefore Franco is statutorily barred from bringing an action against West Coast and Melgoza for personal injuries. The trial court agreed and granted the motion.

DISCUSSION

In reviewing the propriety of a summary judgment, we resolve all doubts in favor of the opposing party. We must conduct a de novo examination to determine whether there are any genuine issues of material fact or whether the moving party is entitled to summary judgment as a matter of law. (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1248.)

To prevail on a summary judgment motion, a defendant must demonstrate that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. "If the defendant meets this burden, the burden shifts to the plaintiff to set forth 'specific facts' showing that a triable issue of material fact exists." (*Angelotti v. The Walt Disney Co.* (2011) 192 Cal.App.4th 1394, 1402 (*Angelotti*).)

Generally, an employee's remedy against an employer for a work related injury is exclusively limited to workers' compensation benefits. (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799, 806.) This workers' compensation exclusivity rule precludes a tort remedy against the employer and, with certain exceptions, another employee of the same employer acting within the scope of employment. (*Angelotti, supra,* 192 Cal.App.4th at p. 1403.)

"An employee may have two employers for purposes of workers' compensation." (*Angelotti, supra,* 192 Cal.App.4th at p. 1403.) When an employer lends an employee to another employer and relinquishes to the borrowing employer all right of control over the employee's activities, a "'special employment' relationship arises between the borrowing employer and the employee." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492

(*Marsh*).) In this situation, an injured worker can look to both employers for workers' compensation benefits. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 175 (*Kowalski*).) Thus, where there is dual employment, a worker is barred from maintaining an action for damages against either the general or the special employer. (*Ibid.*)

"In determining whether a special employment relationship exists, the primary consideration is whether the special employer has '"[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not …."'" (*Kowalski, supra,* 23 Cal.3d at p. 175.) When the alleged special employer exercises control over the details of an employee's work, such control strongly supports the existence of a special employment relationship. (*Id.* at p. 176.)

Secondary factors are also considered. These factors include whether: the employer had the right to discharge at will without cause; the employee provides skilled or unskilled labor; the work is part of the employer's regular business; the employment period is lengthy; and the employer provides the tools and equipment used. Additional consideration is given to whether the employee consented to the employment relationship, either expressly or impliedly, and whether the parties believed they were creating the employer-employee relationship. (*Kowalski, supra,* 23 Cal.3d at pp. 177-178.)

However, these individual factors cannot be applied mechanically as separate tests. Rather, they are intertwined and their weight depends on the particular circumstances. (*Angelotti, supra,* 192 Cal.App.4th at p. 1404.) It is the nature of the work and the overall arrangement between the parties that must be examined. (*Ibid.*)

The existence or nonexistence of the special employment relationship is generally a question reserved for the trier of fact. (*Marsh, supra*, 26 Cal.3d at p. 493.) Nevertheless, this issue can be decided by the court as a matter of law if the evidence supports only one reasonable conclusion. (*Angelotti, supra,* 192 Cal.App.4th at p. 1404.)

Here, Franco's own testimony demonstrates that West Coast controlled the manner in which Franco performed the work. Franco stated he was shown what to do by West Coast employees and thereafter spent every work day with Melgoza who supervised and directed Franco's activities while they loaded and unloaded pipe. Thus, the primary consideration for finding a special employment relationship exists.

Certain secondary factors further support finding the existence of a special employment relationship. The evidence demonstrates: Franco was performing West Coast's work; Franco was providing unskilled labor; West Coast had the power to terminate Franco from West Coast's employment; West Coast provided the tools necessary for Franco to do the work, i.e., a hammer and a table saw; Franco did the same job for over two months; and Franco consented to working for West Coast.

Franco argues there are numerous questions of fact regarding whether he was a special employee of West Coast. Franco interprets his own testimony on West Coast's supervision over him as not demonstrating the type of detailed control and direction necessary to find an employment relationship. However, contrary to Franco's position, he provided unskilled labor and this labor was directly supervised by Melgoza. Thus, West Coast had the power to direct and control Franco. The fact that Franco occasionally cut chocks or picked up debris on his own initiative does not change this analysis.

Franco also notes that he received his paycheck from tempSERVE. However, the payment of wages is not determinative. (*Kowalski, supra,* 23 Cal.3d at p. 177.)

Franco further points out that West Coast could not terminate him. Rather he was employed by tempSERVE. Nevertheless, West Coast could terminate Franco's position with West Coast. This is strong evidence of the existence of a special employment relationship. (*Kowalski, supra,* 23 Cal.3d at p. 177.)

Finally, the fact that Franco and tempSERVE provided Franco's safety gear does not change the nature of the employment relationship. This type of safety gear is widely

used in many different situations. However, the tools provided by West Coast were specific to the particular job performed by Franco.

In sum, the primary consideration in a special employment relationship, i.e., the exercise of control over the details of the employee's work, indicates West Coast was Franco's special employer. This conclusion is further supported by the secondary factors outlined above.

The facts relied on by Franco regarding his relationship with tempSERVE do not change the analysis. The evidence that: tempSERVE paid Franco; tempSERVE and Franco provided Franco's safety gear; Franco would inform tempSERVE, not West Coast, if he could not report to work; and West Coast intended that its employees not become special employees of those companies contracting with tempSERVE for labor, is of little significance. Franco's interactions with tempSERVE, as one of Franco's employers, did not affect West Coast's right to control the details of Franco's work for West Coast. Thus, viewing the evidence as a whole, the only reasonable conclusion is that a special employment relationship existed between Franco and West Coast. Accordingly, the trial court properly entered summary judgment in favor of West Coast and Melgoza.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.