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Workers' Compensation Law - New Mexico Clarifies the Meaning of a Special Employer as Distinct from a Statutory Employer: Rivera v. Sagebrush Sales, Inc.

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WORKERS' COMPENSATION LAW—New Mexico Clarifies the Meaning of a Special Employer as Distinct From a Statutory Employer: *Rivera v. Sagebrush Sales, Inc.*

I. INTRODUCTION

The New Mexico Court of Appeals in *Rivera v. Sagebrush Sales, Inc.*,[1] clarified the difference between a special employer and a statutory employer under the New Mexico Workers' Compensation Act.[2] The court held unanimously that defendant Sagebrush was the special employer of the plaintiff, a temporary laborer, when he was injured on the job.[3] The court found Sagebrush liable for workers' compensation coverage; therefore, Rivera was barred from suing Sagebrush for negligence.[4]

The court applied a three-part test to determine whether an employment relationship existed between Sagebrush and Rivera and whether Sagebrush was liable for workers' compensation.[5] In doing so, the court drew the distinction between a special employer and statutory employer, stated the rules applicable to each employer, and identified situations in which the different rules apply.[6] This Note will provide an overview of the special and statutory employer doctrines, examine the treatment of the doctrines in New Mexico and other jurisdictions, analyze the rationale of the *Rivera* court, and discuss the implications of the court's decision on employers and employees in New Mexico.

II. STATEMENT OF THE CASE

Jerry Rivera was injured while tagging lumber at a lumberyard owned by Sagebrush Sales, Inc.[7] Rivera suffered a severe head injury after falling eight feet from a forklift which was owned by Sagebrush and operated by a Sagebrush employee.[8] At the time of the accident, Rivera was a direct employee of Madden Temporary Services, Inc.[9] Rivera's employment with Sagebrush resulted from a contract between Madden and

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1. 118 N.M. 676, 884 P.2d 832 (Ct. App.), *cert. denied*, 118 N.M. 585, 883 P.2d 1282 (1994).

2. *Id.* at 680, 884 P.2d at 835. Because the Act does not specifically address special employers, there was some level of confusion in the New Mexico bar regarding the distinction between special and statutory employers. *Id.* at 678, 884 P.2d at 834.

3. *Id.* at 680, 884 P.2d at 835.

4. *Id.*

5. *Id.* at 678-79, 884 P.2d at 834-35. See *infra* note 45.

6. *Id.* at 678, 884 P.2d at 834. The court found it necessary to clarify the difference between the two type of employers due to the confusion surrounding the topic. *Id.*

7. Unless otherwise noted, all subsequent factual and procedural references refer to *Rivera*, 118 N.M. at 677, 884 P.2d at 833.

8. Workers' Compensation Accident Report (Jan. 17, 1990) (on file with New Mexico Court of Appeals).

9. *Rivera*, 118 N.M. at 677, 884 P.2d at 833.

Sagebrush, wherein Madden provided temporary labor for Sagebrush on an as-needed basis.[10] The language of the contract specifically absolved Sagebrush from owing any duties toward any worker supplied by Madden as an employer under the workers' compensation laws.

After receiving benefits from Madden's workers' compensation carrier, Rivera brought suit against Sagebrush alleging negligence. Sagebrush moved for summary judgment claiming that Rivera's suit was barred by the exclusivity provision[11] of the Workers' Compensation Act because Sagebrush was Rivera's statutory employer. The district court granted Sagebrush's motion for summary judgment. Rivera appealed.[12] The court of appeals affirmed the trial court's decision and held: 1) Sagebrush was the special employer of Rivera and was liable for workers' compensation coverage; 2) Sagebrush did not waive its right to rely on the exclusivity provisions of the Workers' Compensation Act by contracting with Madden; and 3) the statutory employer provision of the Act was inapplicable to this case.[13]

III. HISTORICAL AND CONTEXTUAL BACKGROUND

A. Workers' Compensation Law in General

The first workers' compensation act in the United States was passed in 1908 to cover government employees.[14] Prior to 1908, an injured employee had to bring a common law negligence action to recover damages for a work injury.[15] The theory underlying the passage of workers'

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10. Docketing Statement at 3, 7, Rivera v. Sagebrush Sales, Inc., 118 N.M. 676, 884 P.2d 832 (Ct. App.) (No. 14724), *cert. denied*, 118 N.M. 585, 883 P.2d 1282 (1994).

11. The exclusivity provision of the New Mexico Workers' Compensation Act states,

> Any employer who has complied with the provisions of the Workers' Compensation Act . . . shall not be subject to any other liability whatsoever for the death of or personal injury to any employee, except as provided in the Workers' Compensation Act, and all causes of action . . . and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee . . . are hereby abolished except as provided in the Workers' Compensation Act.

N.M. STAT. ANN. §§ 52-1-8 (c)(Repl. Pamp. 1991).

12. Prior to oral arguments the court distinguished a statutory employer from a special employer. *Rivera*, 118 N.M. at 678, 884 P.2d at 834. New Mexico's statutory employer provision is stated in § 52-1-22:

> As used in the Workmen's Compensation Act . . . where any employer procures any work to be done wholly or in part for him by a contractor other than an independent contractor and the work so procured to be done is a part or process in the trade or business or undertaking of such employer, then such employer shall be liable to pay all compensation under the Workers' Compensation Act to the same extent as if the work were done without the intervention of such contractor. The work so procured to be done shall not be construed to be "casual employment."

N.M. STAT. ANN. § 52-1-22 (Repl. Pamp. 1991).

13. *Rivera*, 118 N.M. at 676, 884 P.2d at 832. The case was not remanded to be decided under the special employer doctrine because the parties agreed that the facts gathered during discovery were equally relevant to either doctrine. *Id.* at 681, 884 P.2d at 837.

14. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 80, at 573 (5th ed. 1984). By 1921, most states had adopted their own workers' compensation acts. *Id.*

15. *Id.* at 572.

compensation acts was that "human accident losses . . . are to be treated as a cost of production . . . ."[16]

Several bargains were struck in enacting the existing workers' compensation laws. Employees were guaranteed compensation for their injuries arising in the course of employment and employers were granted limited liability if they complied with the laws.[17] The workers' compensation laws created a form of strict liability in that the employer is responsible for compensating "injuries arising out of his business" without regard to the negligence of either the employer, worker, or co-worker.[18]

1. New Mexico's Workers' Compensation Act

New Mexico passed its first workers' compensation act in 1917.[19] The current Act is compulsory,[20] abolishes the common law defenses,[21] and provides for compensation fixed by statute.[22] Compensation is limited to injuries arising while in the course of employment.[23] When the employer complies with the insurance coverage requirements, the employee's remedies are deemed exclusive, and the Act bars an employee from bringing a common law action against an employer or a fellow employee.[24] However, as a result of the compromise struck between employers and employees, the employee has assurance that he will be compensated.[25] Because compliance with the Act is compulsory, if an employer fails to comply

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16. *Id.* at 573. The employer is expected to add the cost of insurance coverage to his costs which will be transferred to the consumer. *Id.*

17. *See* Sanchez v. Hill Lines, 123 F. Supp. 42, 44 (D.N.M. 1954) (citing Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932)).

18. KEETON ET AL., *supra* note 14, at 573.

19. 1917 N.M. Laws, ch. 83, §§ 1-24.

20. *See* Montano v. Williams, 89 N.M. 86, 547 P.2d 569 (Ct. App.), *aff'd*, 89 N.M. 242, 550 P.2d 264 (1976). The compulsory idea was intended to "equalize the burden over the entire industry." KEETON ET AL., *supra* note 14, at 573.

21. N.M. STAT. ANN. § 52-1-8 (A)-(C). In New Mexico, the employee's negligence is not a valid defense to a workers' compensation claim unless the employee's conduct was willful. N.M. STAT. ANN. § 52-1-8(C). *See also* Gough v. Famariss Oil & Ref. Co., 83 N.M. 710, 496 P.2d 1106 (Ct. App.), *cert. denied*, 83 N.M. 698, 496 P.2d 1094 (1972) (employee's intentional misconduct which causes the injury is an employer defense to a claim for workers' compensation benefits).

22. N.M. STAT. ANN. §§ 52-1-41 to -49 (Repl. Pamp. 1991). The relief available under the Act is limited both in amount and length of time. *See, e.g.*, N.M. STAT. ANN. § 52-1-41 (Repl. Pamp. 1991 & Supp. 1995). Employees with total disability incurred after 1987 are entitled to 85% of the average weekly wage in the state a week. N.M. STAT. ANN. § 52-1-41(A). If the disability is not the result of primary or secondary mental impairment, the benefits are available for the remainder of the employee's life. N.M. STAT. ANN. § 52-1-41(A)-(C).

23. *See* Jelso v. World Balloon Corp., 97 N.M. 164, 171, 637 P.2d 846, 853 (Ct. App. 1981). The Act sets out three conditions that must be met for an employee to be compensated:

> [a] at the time of the accident, the employer has complied with the provisions thereof regarding insurance; [b] at the time of the accident, the employee is performing service arising out of and in the course of his employment; and [c] the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

N.M. STAT. ANN. §§ 52-1-9 (Repl. Pamp. 1991).

24. N.M. STAT. ANN. § 52-1-8.

25. KEETON ET AL., *supra* note 14, at 574.

with the Act, the employer exposes itself to common-law liability for an employee's on-the-job accident.[26]

In New Mexico, employers of three or more workers are required to comply with the Act.[27] Most workers' compensation statutes exclude workers who neither receive pay nor expect to receive any kind of compensation for their services.[28] New Mexico requires some compensation-based criteria for calculating an award.[29] Hence, volunteers are not covered by workers' compensation statutes.

2. Applicability to Various Types of Employers

For an employer to seek refuge under the exclusivity provision of the Act, some form of an employer-employee relationship must exist.[30] Therefore, employers often seek recognition as either a special or statutory employer in order to gain immunity from common law negligence suits. Although few states have actually addressed special employers in their workers' compensation statutes,[31] courts have applied the statutes to several types of employers including special and statutory employers.[32]

The statutory employer doctrine is the creation of an employment relationship pursuant to state law.[33] A statutory employer relationship typically arises when a general contractor hires another contractor to complete work that is part of the trade or business of the general contractor.[34] The statutory employer must retain supervision and control over the work being done.[35] The hired subcontractor cannot be an independent contractor. If the requirements of the statute are met, the general contractor becomes the statutory employer of the subcontractor and the subcontractor's employees.[36] The statutory employer is shielded from common law negligence actions for injuries arising in the course of employment.[37]

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26. *See Montano*, 89 N.M. at 88, 547 P.2d at 571.

27. N.M. STAT. ANN. § 52-1-6(A) (Repl. Pamp. 1991). The Act also applies to "all employers engaged in activities required to be licensed under the provisions of the Construction Industries Licensing Act." *Id.* Employers of private domestic servants and ranch and farm laborers are excluded. *Id.*

28. 1B ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 47.41, at 8-347 (1994).

29. N.M. STAT. ANN. § 52-1-20 (Repl. Pamp. 1991).

30. Quintana v. University of California, 111 N.M. 679, 681, 808 P.2d 964, 966 (Ct. App.), *cert. denied*, 111 N.M. 678, 808 P.2d 963 (1991).

31. Elizabeth J. Fullenkamp, *Goodman v. Sioux Steel Co.: South Dakota Limits Temporary Employees' Recovery to Workers' Compensation*, 38 S.D. L. REV. 379, 386 n.72 (1993).

32. Statutory employer sections within a workers' compensation act are aimed at stopping evasion of the act by persons tempted to subdivide their business operations among several subcontractors in an attempt to avoid a direct relationship with the workers. 1C LARSON, *supra* note 28, § 49.15, at 9-29 to -31.

33. In New Mexico the applicable statute is N.M. STAT. ANN. § 52-1-22 (Repl. Pamp. 1991).

34. *See Quintana*, 111 N.M. 679, 681, 808 P.2d 964, 966.

35. The employer does not have a right of control over the manner in which an independent contractor does the work. KEETON ET AL., *supra* note 14, § 71, at 509. Subcontractors may or may not be independent contractors, but the latter are excluded from most statutory employer provisions.

36. *Quintana*, 111 N.M. at 683, 808 P.2d at 968 (statutory employer relationship established between the contractor and the general contractor; contractor's employee barred from bringing suit against general contractor).

37. *Id.* at 681, 808 P.2d at 966.

A special employer relationship, on the other hand, arises when an *individual* is assigned by a temporary employment agency to work for another employer.[38] When an employer loans or permits his employee to perform services for another employer, the employee, with respect to those services, may become the employee of the party to whom his services are rendered.[39] The employee has two employers, the general and special employer, both of whom may be liable for workers' compensation coverage.[40] The special employer becomes liable when "(1) the employee has made a contract of hire, express or implied, with the special employer; (2) the work being done is essentially that of the special employer; and (3) the special employer has the right to control the details of the work."[41]

B. Other Jurisdictions

1. Special Employer Doctrine

Several jurisdictions apply the "Larson" test[42] to determine when a special employer relationship exists and when a special employer is liable for workers' compensation coverage.[43] If the Larson factors are satisfied, the special employer is considered an "employer" and is entitled to immunity under the applicable workers' compensation act if in compliance with the act's requirements.[44]

a. Contract of Hire Necessary Between the Loaned Employee and the Special Employer

The loaned employee must consent to the employment relationship in order for a contract of hire to exist between the employee and the special employer.[45] As shown in the following cases, courts have found an employee's consent expressed in a variety of ways.

A New Jersey court found an implied contract of hire to exist when a temporary employee voluntarily reported to work, complied with the employer's store policies, and accepted training and guidance from the borrowing employer.[46] The appellate court relied on the Larson test in

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38. RESTATEMENT (SECOND) OF AGENCY § 227 (1958).

39. *Id. See also* Ghersi v. Salazaar, 883 P.2d 1352, 1356 (Utah 1994) (Stating "A temporary labor service is a 'general employer'; a temporary employee is a 'loaned employee'; and the business to which the employee is assigned is a 'special employer.'"). *Id.* A general employer is usually an employment agency, personnel service or labor broker.

40. *Rivera*, 118 N.M. at 678, 884 P.2d at 834.

41. LARSON, *supra* note 28, § 48.00, at 8-434 [hereinafter "the Larson Test"].

42. LARSON, *supra* note 28.

43. Antheunisse v. Tiffany & Co., 551 A.2d 1006, 1007 (N.J. Super. Ct. App. Div. 1988), *cert. denied*, 556 A.2d 1206 (N.J. 1989); Santa Cruz Poultry, Inc. v. Superior Court, 239 Cal. Rptr. 578, 580 (1987); Whitehead v. Safway Steel Products, Inc., 497 A.2d 803, 811 (Md. Ct. App. 1985); Wright v. Habco, Inc., 419 S.W.2d 34 (Mo. 1967). ***But see*** English v. Lehigh County Authority, 428 A.2d 1343, 1351 (Pa. Super. 1981) (rejecting the Larson test as too broadly asserted).

44. Word v. Motorola, Inc., 662 P.2d 1024, 1027 (Ariz. 1983) (en banc).

45. LARSON, *supra*, note 28, §§ 48.11-12, at 8-434 to -45. The focus should be on the employee when determining consent. *Id.* at 8-440. If the employee did not consent to a contract of hire with the special employer, the analysis ends. *Id.*

46. *Antheunisse*, 551 A.2d at 1008.

affirming the trial court's finding that the defendant was a special employer of the plaintiff.[47]

Maryland courts utilize a five part test to determine whether an employer/employee relationship exists.[48] The five criteria are as follows: 1) power to select and hire the employee; 2) payment of wages; 3) power to discharge; 4) power to control the employee's conduct; and 5) whether the work is part of the regular business of the employer.[49] The two elements Maryland adds to the Larson test, the payment of wages and the ability to fire the employee, are often considered by other jurisdictions when determining the right to exercise control.[50]

Other courts have rejected the Larson test when analyzing the consent issue.[51] A Pennsylvania court held that the law did not require the existence of a contract of hire between the special employer and the loaned employee.[52] Rather, the critical factor was whether the employment was induced by some consideration.[53] Applying the consideration test, the court found that the plaintiff was working for valuable consideration and hence was an employee of the defendant.[54]

The Pennsylvania court applied the third factor in the Larson test to determine whether an employee impliedly consented to an employment relationship.[55] The court stated that consent only requires that the employee "consent to submit himself to the control and supervision of the borrowing employer . . . ."[56] Because the temporary employee followed the instructions of the special employer's employee, the court found he consented to work for the employer.[57]

An employee's belief as to who is his employer is of little significance to the courts.[58] A plaintiff's characterization of who is his employer is not controlling because the definition of "employer" is controlled by its legal meaning in the Act itself and the supporting case law.[59] Maryland courts have held that the defendant's failure to name the plaintiff as an

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47. *Id.* at 1007, 1009.

48. *Whitehead*, 497 A.2d at 808.

49. *Id.* at 808, 809.

50. *See Antheunisse*, 551 A.2d at 1008; *English*, 428 A.2d at 1353-54.

51. *English*, 428 A.2d at 1351.

52. *Id.* at 1352-53. Plaintiff relied on the Larson test which the court found to be asserted too broadly. *Id.* at 1351. Plaintiff argued that an employment contract did not exist between the defendant and English. The court said the cases the plaintiff relied upon, when carefully read, supported the proposition that a contract of hire, express or implied, is not required under the law. *Id.* at 1352-1353.

53. *Id.* at 1353.

54. *Id.* The defendant was the Lehigh County Authority which hired two temporary workers from Kelly Labor.

55. *Id.*

56. *Id.* at 1353-54 (employee clearly consented by showing up to work and following the orders of the defendant's employee). The court also relied on the fact that the plaintiff knew Kelly Labor was in the business of supplying workers to employers. *Id.* at 1354.

57. *English*, 428 A.2d at 1347.

58. *Id.* at 1354; *Whitehead*, 497 A.2d at 812 (stating "the parties' subjective belief as to whether an employment relationship exists is not dispositive of the legal question of whether one is the employer of another . . . .") (citing Sun Cab v. Powell, 77 A.2d 783, 786 (Md. Ct. App. 1951)).

59. *English*, 428 A.2d at 1354.

employee in its answer to interrogatories is not dispositive of the legal question of whether the defendant was an employer of the plaintiff.[60]

b. The Employee Must Be Engaged in Work That is Essentially That of the Special Employer

When applying the second part of the Larson test the focus should be on the relationship between the employee claimant and the special employer when analyzing the work being done.[61] The following examples constitute doing the work of the special employer: 1) packing china and crystal for a retailer of those items;[62] 2) sampling sewage at a sewage metering station;[63] 3) loading steel scaffolding for a steel company;[64] and 4) assisting in renovating a building for a real estate holding company.[65] Each of these activities was found to be the work of the individual special employers.

c. The Special Employer Must Have the Right to Control the Details of the Work Being Done by the Employee

In analyzing the employer's right to exercise control, the courts look to whether the employee is subject to the supervision of the employer and whether the employer has the ability to discharge the employee.[66] In New Jersey, a worker's knowledge that she would be terminated if she did not submit to the defendant's direction constituted control over the employee.[67] Also, the existence of the right to control an employee creates the employment relationship, not the actual exercise of that control.[68]

A California court applying the Larson test found that the defendant's control over the plaintiff's job performance implied, as a matter of law, an employment relationship between the two parties.[69] The plaintiff was barred from bringing an action against the defendant and was limited to the remedy provided under workers' compensation.[70]

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60. *Whitehead*, 497 A.2d at 812.

61. *Cf. Quintana*, 111 N.M. at 681, 808 P.2d at 966 (concluding that in a statutory employer analysis, the focus is not on the employer and the claimant; rather, it is on the employer and the contractor).

62. *Antheunisse*, 551 A.2d at 1008.

63. *English*, 428 A.2d at 1346.

64. *Whitehead*, 497 A.2d at 805.

65. *Wright*, 419 S.W.2d at 35.

66. *See Antheunisse*, 551 A.2d at 1008 (defendant maintained power to supervise, discharge or recall the plaintiff during the holiday season); *Wright*, 419 S.W.2d at 35 (Wright testified that each day the defendant's employee would instruct him as to his duties for the day). *See also Santa Cruz Poultry, Inc.*, 239 Cal. Rptr. 578, 582 (special employer's control over the employee's job performance implied an employment relationship).

67. *Antheunisse*, 551 A.2d at 1008.

68. *English*, 428 A.2d at 1350. The court recognized that the Authority did not *exercise* significant control over the sewage sampling but it had the ability to exercise complete control. *Id.* The court went on to say that the lack of control exercised by the Authority demonstrated its negligence. *Id.*

69. *Santa Cruz Poultry*, 239 Cal. Rptr. at 582. Defendant's employee supervised and controlled the work of the plaintiff. *Id.* at 579. Plaintiff recovered benefits from its general employer, Manpower Inc., but sought damages from the defendant. *Id.*

70. *Id.* at 583.

The Larson test does not require an employer to directly control the payment of wages, taxes, and insurance to the employee in order to satisfy the right to control test.[71] The payment of money to an employment agency, in excess of the amount due to a worker, is deemed to be a satisfactory arrangement if the additional monies are used to provide insurance coverage for the worker.[72] If an employment agency bills the special employer for wages plus additional amounts to cover income taxes, social security payments, unemployment compensation, and workers' compensation, evidence of the billing method is sufficient to show that the special employer provided for the purchase of workers' compensation coverage.[73] Hence, the failure of the special employer to *directly* provide for workers' compensation coverage does not indicate the lack of an employment relationship or a lack of control over the employee.

2. A Statutory Employer Is not a Special Employer

In 1983, an Arizona decision enunciated the difference between a statutory and special employer.[74] The employer asserted a statutory employer defense claiming that it was immune from suit under Arizona's statutory employer doctrine.[75] The supreme court found that the defendant did not procure the labor supplier to work as a contractor, which is a requirement of the statutory employer doctrine.[76] Rather it borrowed the plaintiff to assist in the task of remodeling the plant which is consistent with the special employer doctrine.[77]

Because the statutory employer defense is an affirmative defense that must be raised and established by the defendant under the appropriate legal theory, the case was remanded to decide whether the plaintiff was an employee under the lent employee doctrine.[78] The court also held that an employee's consent "is not a necessary element for application of the statutory employer doctrine."[79]

C. *New Mexico Law*

1. Special Employer Doctrine in New Mexico

For the past thirty years, New Mexico courts have applied the Larson test in deciding whether an employer is liable for workers' compensation.[80]

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71. *Antheunisse*, 551 A.2d at 1008; *English*, 428 A.2d at 1346. *See* Garcia v. Smith Pipe and Steel Company, 107 N.M. 808, 765 P.2d 1176 (Ct. App.), *cert. denied*, 107 N.M. 673, 763 P.2d 689 (1988).

72. *Antheunisse*, 551 A.2d at 1008-09.

73. *English*, 428 A.2d at 1350 (finding the defendant's contribution to the insurance coverage was shown by the payment of additional monies to the temporary agency). *Id. See also Antheunisse*, 551 P.2d. at 1009.

74. *Word*, 662 P.2d 1024. The facts of this case are set out in *Word*, 662 P.2d 1024, 1025.

75. *Id.* The defense was based on the ARIZ. REV. STAT. ANN. § 23-902(B) which is similar to New Mexico's statutory employer statute.

76. *Id.* (noting that Motorola had not hired a general contractor to do the remodeling). *Id.*

77. *Id.* at 1024, 1026.

78. *Id.* at 1027.

79. *Id.* at 1026.

80. *See generally* Johnson v. Aztec Well Servicing, Inc., 117 N.M. 697, 875 P.2d 1128 (Ct. App. 1994); Wuertz v. Howard, 77 N.M. 228, 421 P.2d 441 (1966); and Shipman v. Maaco Corp., 74 N.M. 174, 392 P.2d 9 (1964).

In *Shipman v. Macco Corp.*,[81] the court applied the "whose-is-the-work-being-done" test in deciding whether an employment relationship existed.[82] The court held that Shipman was the defendant's employee and denied Shipman the ability to sue the defendant in tort.[83] The court found that the employee was engaged in doing the work of the defendant and was under the "direction and control" of the defendant's employee.[84]

Two years later, in *Wuertz v. Howard*,[85] the court applied the same test and found the existence of a "special" employer relationship.[86] *Wuertz* is different from the other special employer cases because the special employer relationship developed quickly and without the consent of the general employer.[87] In the other cases discussed, a contract usually existed between the general employer and the special employer, either oral or written, but the *Wuertz* court found that a contractual relationship between the two employers was unnecessary to create a new employment relationship.

In *Wuertz*, the plaintiff argued on appeal that he was not a special employee of the defendant because the time he was employed was too short, the assistance he gave was with the consent of his direct employer, the accident did not occur on the defendant's premises, and he did not consent to the new relationship with the defendant.[88] The court found the following: (1) the term of employment is not part of the test;[89] (2) the direct employer's consent to the "loan" is irrelevant;[90] (3) the location of the accident was not a pertinent factor in determining the status of employment;[91] and, (4) although not necessarily required, a consensual relationship did exist between plaintiff and defendant.[92] The court held Wuertz to be a special employee of Halliburton, the co-defendant, and barred him from seeking anything other than workers' compensation benefits.[93] In the most recent decision,[94] the court of appeals said that

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81. 74 N.M. 174, 392 P.2d 9 (1964) (holding that the defendant was not a "special" employer, but the result was the same).

82. *Id.* at 177, 392 P.2d at 11 (citing Jones v. George F. Getty Oil Company, 92 F.2d 255 (10th Cir. 1937)). This is otherwise known as the "nature-of-the-work" test.

83. *Shipman* at 178, 392 P.2d at 12.

84. *Id.* (finding noteworthy that the defendant had a number of employees on its payroll doing the exact work of the plaintiff, and the work being done by the temporary employees was ultimately finished by the defendant's employees). *Id.* at 178, 392 P.2d at 11-12.

85. 77 N.M. 228, 421 P.2d 441 (1966). Plaintiff was injured when co-defendant's employee asked for assistance in unclogging a cement hose. The parties stipulated that the co-defendant was an independent contractor. *Id.* at 230, 421 P.2d at 442.

86. *Id.* at 232, 421 P.2d at 443.

87. *Id.* at 230, 421 P.2d at 442.

88. *Id.*

89. *Id.* at 230-31, 421 P.2d at 442.

90. Wuertz v. Howard, 77 N.M. 228, 231, 421 P.2d 441, 443. The plaintiff was relying on a Wisconsin decision which held "where the employee entered into the service of another at the command of and pursuant to the direction of his general employer, no new relationship is created." *Id.* at 231, 421 P.2d at 442 (citing Rhinelander Paper Co. v. Industrial Commission, 239 N.W. 412 (Wis. 1931)).

91. *Wuertz* at 231, 421 P.2d at 443.

92. *Id.*

93. *Id.* at 232, 421 P.2d at 443.

94. *Johnson*, 117 N.M. 697, 875 P.2d 1128. The facts of this case are set out in *Johnson*, 117 N.M. at 699, 875 P.2d at 1130.

if all three elements of the Larson test were met for both employers, both would be liable for workers' compensation.[95]

2. Independent Contractor Defined in New Mexico

Because the statutory employer doctrine expressly excludes independent contractors, it is helpful to understand who is an independent contractor in New Mexico. "The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for."[96] Thus, an independent contractor cannot be a statutory employee because the hiring employer cannot control the details of the independent contractor's daily work, only the result to be achieved.

3. Statutory Employer Provision in New Mexico

A contract between a general contractor and a subcontractor must satisfy two express conditions in order for the general contractor to qualify as a statutory employer under section 52-1-22 of the Workers' Compensation Act: (1) the general contractor must procure work, wholly or in part, to be done by a contractor other than an independent contractor; and (2) the "work . . . must be a part or process in the trade, business, or undertaking of the general contractor."[97] Accordingly, in New Mexico, the "power-to-control" test[98] and the "relative-nature-of-the-work" test[99] are deemed to be consistent with the conditions imposed by section 52-1-22 of the Workers' Compensation Act.[100]

In *Quintana*, the defendant met the two statutory employer conditions as a matter of law. It maintained the right to exercise control over the day-to-day work done by Pan Am under the contract terms, and it hired Pan Am to do the work that it would otherwise have to do itself to keep the lab functioning. Therefore, Pan Am was not an independent contractor. The defendant fulfilled the prerequisite to immunity under the exclusivity provision by establishing the existence of a statutory employer-employee relationship.[101] The court held that the Regents were entitled to summary judgment pursuant to the exclusivity provision as a statutory employer.[102]

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95. *Id.* (reversing the summary judgment granted in favor of the employer but not deciding whether a special employment relationship existed because the plaintiff had not been allowed to conduct discovery to adequately determine the relationship between the defendant and the general employer). *Id.* at 700, 875 P.2d at 1131.

96. *Shipman*, 74 N.M. 174, 177, 392 P.2d 9, 11.

97. *Quintana*, 111 N.M. 679, 681, 808 P.2d 964, 966. New Mexico cases discussed in *Quintana* actually referred to a different two-part test which the court found to be consistent with the current conditions. The previous test utilized by the New Mexico courts combined the "power-to-control" test and the "relative-nature-of-the-work" test. *Id.*

98. *See* Burton v. Crawford & Co., 89 N.M. 436, 553 P.2d 716 (Ct. App. 1976) (preferring the relative-nature-of-the-work test as the better method when determining the status of an employee).

99. *Id.*

100. *Quintana*, 111 N.M. at 682, 808 P.2d at 967.

101. *Id.* at 684, 808 P.2d at 969.

102. *Id.* at 680, 808 P.2d at 965.

Based on *Quintana*, the distinction between a special employer and a statutory employer is that under a statutory employer doctrine, an entire firm or agency is hired to do the work of the general employer or contractor.[103] Conversely, while under a special employer situation, a general employer lends an individual employee to another general employer to do the work of the borrowing employer.[104] In a statutory employer situation, the work procured must remain under the control of the general contractor, and the relationship analyzed is that between the general contractor and the hired subcontractor.[105] In a special employer case, the relevant relationship is the one between the lent employee and the borrowing employer.[106]

IV. RATIONALE OF THE *RIVERA* COURT

After drawing a distinction between a special employer and a statutory employer, the court concluded that Sagebrush was Rivera's special employer at the time of the accident and was liable for workers' compensation coverage.[107] The court found that Sagebrush did not waive its right to rely on the exclusivity provision of the Act and the statutory employer doctrine was inapplicable.[108]

In deciding the special employer issue, the court applied the three-part Larson test and found that Rivera consented to an employment relationship with Sagebrush when he accepted the assignment from Madden.[109] Under the Larson test, Rivera made an implied contract of hire with Sagebrush; Rivera tagged lumber, which was essentially the work of Sagebrush; and Sagebrush had the right to control the details of Rivera's work at the lumberyard.

The *Rivera* court applied the *Whitehead* decision and found that the lack of an express employment contract between Sagebrush and Rivera did not create a genuine issue of material fact.[110] The court also relied on the holding in *English* to support its conclusion that Sagebrush had the right to control the details of the work performed by Rivera.[111] Sagebrush employees controlled Rivera by instructing him and training him. Rivera responded to those directions. Rivera tried to show that he did not require the help or supervision of Sagebrush by arguing that he "was usually allowed to work alone."[112] The court said the lack of

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103. *See id.*, 111 N.M. at 679, 808 P.2d at 964.
104. *See Shipman*, 74 N.M. 174, 392 P.2d 9.
105. *Quintana*, 111 N.M. at 681, 808 P.2d at 966.
106. *Id.* (stating the contrary for a statutory employer analysis).
107. *Rivera*, 118 N.M. at 681, 884 P.2d at 837.
108. *Id.* at 677, 884 P.2d at 833.
109. *Id.* at 679, 884 P.2d at 835.
110. *Id.*
111. *Id.* at 680, 884 P.2d at 836. As in *Rivera*, the labor supplier in English did not maintain significant control over the manner in which English carried out the sewage sampling; it did not tell English how to conduct the sampling and did not supervise the work being done. *English*, 428 A.2d at 1350.
112. *Rivera*, 118 N.M. at 679, 884 P.2d at 835.

constant supervision did not create a genuine issue of material fact as to the work being performed, it merely pointed to the degree of control Sagebrush exercised over Rivera.[113]

Although Sagebrush did not have the ability to fire Rivera from Madden's employment, Sagebrush maintained the ability to replace Rivera if his work was unsatisfactory at the lumberyard.[114] The court decided the ability to replace Rivera constituted a right to control the details of his work, satisfying element three of the Larson test.[115]

Rivera relied on *Guerrero*[116] to dispute the existence of a contract with Sagebrush.[117] In *Guerrero*, the employee spoke Spanish and the special employer spoke English so the labor broker stopped by the work site several times during the week to check on the employee and supervise the work.[118] A question of fact arose as to who was the employer of Guerrero since it was unclear which party had the right of control.[119] The *Rivera* court found *Guerrero* distinguishable because there were no questions of material fact in the *Rivera* case.[120]

All three elements of the Larson test being met, the court held as a matter of law that Sagebrush was a special employer of Rivera and was liable for workers' compensation.[121] Because Sagebrush provided for the payment of worker's compensation through Madden, it was in compliance with the Act and was entitled to immunity from common law suit under the exclusivity provision of the Act.[122]

Rivera asserted that Sagebrush waived its right to rely on the exclusivity provision of the Act because of language contained in the contract between Sagebrush and Madden.[123] Rivera relied on *Matkins v. Zero Refrigerated Lines, Inc.*,[124] where the court held that Zero relinquished the right to invoke the exclusivity provision of the Act because it contracted away the responsibility to pay workers' compensation insurance for the plaintiff.[125]

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113. *Id.*

114. *Id.* at 680, 884 P.2d at 836.

115. *Id.*

116. Guerrero v. Standard Alloys Manufacturing Co., 566 S.W.2d 100 (Tex. Civ. App. 1978).

117. *Rivera*, 118 N.M. at 679, 884 P.2d at 835. The *Guerrero* court held that an "employee must know or be charged with knowledge of the lending agreement" in order to establish an employer-employee relationship with a borrowing employer. *Guerrero*, 566 S.W.2d at 102. On appeal, the *Guerrero* court found a lack of consent between the employee and the special employer resulting in a reversal of the summary judgment granted at trial. *Id.* at 102.

118. *Id.* at 102. Labor broker went so far as to instruct the employee on how to do the job, including pointing out areas of improvement. *Id.* In addition, the labor broker was present when the employee was injured. *Id.*

119. *Rivera*, 118 N.M. at 679, 884 P.2d at 835.

120. *Id.*

121. *Id.* at 680, 884 P.2d at 836.

122. *Id.*

123. *Id.* at 678, 884 P.2d at 834. The contract provided that the amount Madden charged Sagebrush would include the hourly rate charged, payment for payroll taxes, unemployment compensation, and workers' compensation insurance. See *supra* note 10. The second part of the contract was a document signed by both parties, wherein Sagebrush stated that it "'will be in no way responsible' for any injury suffered by a Madden employee on the job at Sagebrush." *Id.*

124. 93 N.M. 511, 602 P.2d 195 (Ct. App. 1979).

125. *Id.* at 515, 602 P.2d at 199. The court stated that Zero waived its right to the benefits of the Workers' Compensation Act and purposefully subjected itself to common-law liability for negligence when it relieved itself of the obligation to provide workers' compensation insurance. *Id.*

The *Rivera* court found that although the Sagebrush-Madden contract absolved Sagebrush of any duties under the Act, it concurrently required Sagebrush to pay Madden for workers' compensation insurance for Rivera.[126] Since the contract did not absolve Sagebrush of responsibility for such coverage, but specifically provided for it, Sagebrush was entitled to invoke the exclusivity provision of the Act.[127]

The *Rivera* court found the statutory employer defense inapplicable based on the language of the New Mexico statute and the treatment of the statutory employer doctrine in the courts.[128] Applying the New Mexico statute, the court said two conditions must be present: "(1) the employer must procure work to be done by a contractor other than an independent contractor, and (2) the work must be a part of the trade or business of the employer."[129] Because the question before the court was whether Sagebrush was a statutory employer, the court focused on the work performed by Madden and not Rivera.[130]

Following the decision in *Quintana*, the court concluded that Madden was an independent contractor because Sagebrush did not have the right to control how Madden recruited, interviewed or hired its own workers.[131] Nor did Sagebrush contract with Madden to run its lumberyard operations.[132] Similar to *Shipman* and *Word*, Sagebrush used its employees along with Madden employees to do the same work.[133] The court concluded that section 52-1-22 was inapplicable.[134]

The attorneys arguing the case originally made a statutory employer argument but relied on special employer cases.[135] The attorneys took the position that a special employee was one type of statutory employee which led the court to explain the difference between the two types of employers.[136] The court accomplished this distinction by highlighting cases where the parties had encountered the same confusion.[137]

V. ANALYSIS AND IMPLICATIONS

The *Rivera* decision clarified the distinction between a special and statutory employer. Temporary workers have a better perception of when and how they acquire an additional employer and the consequences of that new relationship. Employers have a clearer understanding of what

126. *Rivera*, 118 N.M. at 678, 884 P.2d at 834.
127. *Id.*
128. *Id.* at 680-81, 884 P.2d at 836-37.
129. *Id.* at 680, 884 P.2d at 836.
130. *Id.*
131. *Id.*
132. *Rivera*, 118 N.M. at 681, 884 P.2d at 837. Sagebrush contracted with Madden to obtain temporary laborers to assist in the work of the lumberyard. *Id.*
133. *Id.*
134. *Id.* at 680, 884 P.2d at 836.
135. *Id.* at 678, 884 P.2d at 834.
136. *Id.*
137. *See, e.g.*, *Word*, 662 P.2d 1024; *English*, 428 A.2d 1343.

they need to do to establish a special employer relationship and the corresponding benefits.

A. *Employee Prohibited from Bringing Common-law Negligence Action*

Temporary employees now realize how difficult it is to overcome the exclusivity provision of the Act. Although their common-law remedies are limited, they have gained assurance that an injury arising at a temporary job site will be compensated under the Act.

Rivera did not address whether an employee may seek relief from a special employer when a general employer fails to purchase insurance coverage with the funds provided. Presumably the employee can proceed against the general employer in a common law suit for failing to comply with the Act.[138] In this sense, the Act achieves its purpose of protecting employees from those who wish to evade the system.[139]

B. *Employment Relationship Treated as a Question of Law in New Mexico*

1. Summary Judgment in Special Employer Cases

One common argument on appeal is whether the court has the ability to grant summary judgment when determining the existence of an employment relationship.[140] Plaintiffs in New Mexico rarely win this argument because the courts treat the question of whether an employer-employee relationship exists as a question of law.[141] "Where the material facts [in workmen's compensation proceedings] are undisputed and susceptible of but one logical inference, it becomes a conclusion of law as to whether the status of an employer-employee relationship exists."[142]

While other jurisdictions treat the special employment issue as a question of fact,[143] New Mexico's treats the issue as a question of law. This benefits employers because the mere act of showing up to work is construed as impliedly contracting to work for that special employer. The courts do not seem to consider whether the employee is simply obeying the general employer.[144] The courts construe the consent idea

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138. *See* Shores v. Charter Services, Inc., 106 N.M. 569, 571, 746 P.2d 1101, 1103 (1987) (stating an employee is limited to either filing a workmen's compensation action or filing an action at common law; "the employee is limited to one remedy"). *See also Montano*, 89 N.M. 86, 547 P.2d 569.

139. 1C LARSON, *supra* note 28, § 49.15, at 9-29 to -31.

140. *Shipman*, 74 N.M. 174, 175, 392 P.2d 9, 10 (questioning the court's ability to grant summary judgment when determining whether an employment relationship existed).

141. *Id.* at 174, 178, 392 P.2d 9, 12.

142. *Jelso*, 97 N.M. at 167, 637 P.2d at 849.

143. *See* John L. Valentino, *The Impact of the Temporary Employee on the Employer-Employee Relationship*, 67 N.Y. ST. B.J. 26 (1995). New York treats the special employment issue as a question of fact. *Cf.* Fullenkamp, *supra* note 31, at 400-01 (arguing that the South Dakota court should have allowed a jury to determine whether the temporary employee had consented to an employment relationship with the defendant).

144. *See* 1B LARSON, *supra* note 28, § 48.15, at 8-468.

liberally, favoring the employer seeking immunity under the Act. Thus, it logically follows that suits will continue to be decided by summary judgment.

C. *Employer Benefits*

Because the special employer doctrine protects general and special employers from employee negligence actions, employers of temporary labor[145] will seek special employer status. If the three Larson conditions are met and the special employer provides for the payment of workers' compensation coverage, she can obtain immunity from common law suit. Employers would argue that the employees get what they bargained for: employment with an expeditious remedy if injured on the job. Employees would argue that employers are getting the benefits of "employer" status without all of the corresponding burdens.

Employers will seek the special employer label when it benefits them financially and will seek to avoid it when it exposes them to liability under various employment laws.[146] Prohibiting an employee from suing in tort for work-related injuries provides the employer and its insurer a sense of financial stability. In a special employer relationship, the lending employer's insurance carrier is usually the company paying the workers' compensation benefits and medical expenses. The special employer's carrier remains untouched. Where insurance companies rate employers based on their safety records, the special employer doctrine protects the special employer from increased premiums. Utilizing temporary labor or outsourcing certain functions of a business are two ways of avoiding an employer-employee relationship in an era of expanding employment legislation aimed at protecting employees. Whether the New Mexico courts will hold special employers to the same employment laws in the future is unclear.

The statutory employer doctrine benefits companies that find it necessary or desirable to subcontract out a portion of their operations. Should the court decide to narrow the type of employers entitled to immunity under the workers' compensation law, many governmental or quasi-governmental organizations would be affected in New Mexico.[147] Large employers such as the national labs often use subcontractors to carry out various functions such as maintenance, security, and administration. Organizations may become reluctant to subcontract out portions of their operations, fearing

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145. *See* Valentino, *supra* note 143, at 26. "Between 1982 and 1993, temporary and leased employment grew at the rate of 300% while actual gains in employment increased by only 23%." *Id.* (citing U.S. Department of Labor, Bureau of Labor Statistics, Employment and Earnings (Jan. 1994)).

146. Valentino, *supra* note 143, at 26. Such employment liability includes discrimination claims, the Family and Medical Leave Act, wrongful termination claims and the American with Disabilities Act. *Id.*

147. The New Mexico Supreme Court is currently evaluating the statutory employer doctrine in New Mexico through Romero v. Shumate Constructors Inc., 119 N.M. 58, 888 P.2d 940 (Ct. App. 1994), *cert. granted*, Jan. 9, 1995.

they would become subject to suit under common law theories of negligence for injuries on the premises.

VI. CONCLUSION

In *Rivera*, the New Mexico Court of Appeals clarified the difference between a special employer and a statutory employer in New Mexico. The court found the defendant to be the special employer of the temporary worker because all three elements of the Larson test were satisfied: Rivera impliedly contracted to work for Sagebrush, Rivera performed work normally done by Sagebrush employees, and Sagebrush had the right to control the details of Rivera's work. The worker's common law negligence suit against the borrowing employer was barred because that employer indirectly provided for the worker's workers' compensation coverage. Although the future of the statutory employer doctrine is being challenged in New Mexico, the special employer doctrine appears well settled.

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