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SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.**MEMORANDUM OPINION**

Court of Appeals of Texas, Beaumont.

Richard KOSKEY, Appellant

v.

BAKER HUGHES, INC., Appellee.

No. 09-04-539 CV.

Submitted on June 23, 2005.

Decided Aug. 11, 2005.

On Appeal from the 172nd District Court, Jefferson County, Texas, Trial Cause No. E-167123-A, Donald Floyd, J.

Russell W. Endsley, [Jason A. Gibson](#), Shawn P. Fox, Smith **Gibson**, Houston, for appellant.

[Cynthia Hollingsworth](#), Connor Sheehan, Gardere Wynne Sewell, LLP, Dallas, [Geoffrey Bracken](#), Houston, for appellee.

Before [MCKEITHEN](#), C.J., KREGGER and HORTON, JJ.

MEMORANDUM OPINION

HOLLIS HORTON, Justice.

*1 This appeal arises from a summary judgment granted in favor of a parent corporation that alleged it was protected by the “exclusive remedy” provision of the Texas Workers' Compensation Act against work-related claims of its subsidiary corporation's employee. Because we find that the parent corporation failed to prove it was entitled to summary judgment, we reverse and remand.

Plaintiff Richard Koskey sued Baker Hughes, Inc. (“BHI”) and other defendants regarding injuries he allegedly received during his employment as a sandblaster from 1985 until 1991 for Baker Hughes Tubular Services, Inc. (“Tubular”). Koskey maintains he contracted pulmonary silicosis as a result of his exposure to respirable silica dust. During the entire time Koskey worked for Tubular, BHI was Tubular's parent corporation. In moving for summary judgment under [Texas Rule of Civil Procedure 166a\(c\)](#), BHI claimed that the Texas Workers' Compensation Act (“Act”) and section 408.001(a) of the Act provide the exclusive

remedy for Koskey's work-related injuries. This claim was the sole ground for BHI's successful summary judgment motion.

Standard of Review

In a summary judgment motion brought under [Rule 166a\(c\)](#), the movant has the burden of showing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. [Provident Life and Acc. Ins. Co. v. Knott](#), 128 S.W.3d 211, 215-16 (Tex.2003). We view all evidence in a light favorable to the nonmovant, and we indulge every reasonable inference in the nonmovant's favor. *Id.* To be entitled to summary judgment on an affirmative defense, a defendant must plead and conclusively establish each element of its defense as a matter of law. See [Johnson & Johnson Medical, Inc. v. Sanchez](#), 924 S.W.2d 925, 927 (Tex.1996).

As the trial court granted summary judgment on BHI's affirmative defense of exclusive remedy, BHI must prove each of the defense's elements as a matter of law. See [Garza v. Exel Logistics, Inc.](#), 161 S.W.3d 473, 475 n. 10 (Tex.2005); see [Sanchez](#), 924 S.W.2d at 927. The “exclusive remedy” statute states: “Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.” [Tex. Lab.Code Ann. § 408.001\(a\)](#) (Vernon 1996). Thus, as explained by the Garza Court, the elements of exclusive remedy that BHI was required to show are: (1) that it is an employer under [section 408.001 and \(2\)](#) that it was covered by workers' compensation. See [Garza](#), 161 S.W.3d at 474-75.

In issue three, Koskey asserts that BHI failed to prove it was entitled to the exclusive remedy protection. We agree because BHI did not establish either of the remedy's elements.

First, BHI failed to establish that it was Koskey's employer. Under the Act, the term “employer” is defined, unless otherwise specified, as “a person who makes a contract of hire, employs one or more employees, and has workers' compensation insurance coverage. The term includes a govern-

mental entity that self-insures, either individually or collectively.” [Tex. Lab.Code Ann. § 401.011\(18\)](#)(Vernon Supp.2005). The Texas Supreme Court recently concluded that more than one entity could meet this definition and be considered an injured worker's employer for workers' compensation and exclusive remedy purposes. See [Wingfoot Enterprises v. Alvarado](#), 111 S.W.3d 134, 135, 139-40, 149 (Tex.2003)(holding that exclusive remedy provision applied to general employer that had workers' compensation insurance coverage). To determine if an entity is an employer, the *Garza* Court instructs that we are to “consider traditional indicia, such as the exercise of actual control over the details of the work that gave rise to the injury.” [Garza](#), 161 S.W.3d at 477. In *Garza*, the Court also noted that: (1) the injured worker was working on the premises of the company claiming it was an employer under the Act; (2) the injured worker was furthering that company's day-to-day business; and (3) the company “specifically directed” the injury-causing work's details. *Id.*

*2 BHI maintains it proved the control element of its affirmative defense through Koskey's judicial admissions in his original petition. BHI asserts Koskey made five specific allegations that establish BHI as Koskey's co-employer:

1. BHI “undertook a duty to provide a safe work environment at its subsidiary”;
2. BHI was “in control” of Tubular's facility where Koskey allegedly was exposed;
3. BHI “retained the power to direct the order in which work was done” at Tubular, including “the promulgation of safety procedures and the direction of safety surveillance”;
4. BHI “retained the authority to forbid work at Tubular's facility from being done in a dangerous manner”; and
5. BHI “exercised supervisory control over the operations” at Tubular's plant.

What these allegations lack, however, is any indication that BHI exercised “actual control over the details of the work that gave rise to” Koskey's injury as required by *Garza*. See [Garza](#), 161 S.W.3d at 477. We find that Koskey's pleadings do not constitute judicial admissions sufficient to establish BHI's “actual control” as a matter of law. As BHI presented no other evidence on control, it failed to establish that it was an employer for exclusive remedy purposes. ^{FN1}

^{FN1}. BHI's summary judgment evidence was: (1) Koskey's answers to requests for production to which Koskey's social security records were attached; (2) the affidavit of Juan Rodriguez, insurance administrator for BHI, who stated that during the time period when Koskey was employed by Tubular, Tubular was at all times covered by workers' compensation insurance; (3) the affidavit of Victor Bedford, a former safety coordinator for Tubular, who stated that during the time period when Koskey worked for Tubular, Tubular's employees selected the respiratory protective equipment and sandblasting abrasives used at the site where Koskey worked.

BHI also failed to establish that it was covered by workers' compensation insurance coverage for Koskey's alleged work-related injury as required by [section 408.001\(a\)](#) for purposes of applying the exclusive remedy provision. See [Garza](#), 161 S.W.3d at 481; see [Tex. Lab.Code Ann. § 408.001\(a\)](#). The only summary judgment evidence that BHI presented regarding workers' compensation insurance was Juan Rodriguez's affidavit, which stated that Tubular was covered by workers' compensation insurance; however, Rodriguez's affidavit did not address BHI's coverage. BHI further argues that Koskey waived any objection to Rodriguez's affidavit by not objecting to it before the trial court. But, Koskey had no need to object to an affidavit that did not establish BHI's coverage, which was an element that BHI had to prove to be entitled to summary judgment on its exclusive remedy defense. See [Sanchez](#), 924 S.W.2d at 927.

We find that BHI failed to establish the required elements of its exclusive remedy defense and sustain issue three. Because our resolution of issue three disposes of this case, we need not consider Koskey's other issues. See [Tex.R.App.P. 47.1](#).

We reverse the trial court's summary judgment in BHI's favor and remand the case to the trial court for further proceedings.

REVERSED AND REMANDED.

Tex.App.-Beaumont,2005.

Not Reported in S.W.3d

Not Reported in S.W.3d, 2005 WL 1906964 (Tex.App.-Beaumont)

(Cite as: Not Reported in S.W.3d)

Koskey v. Baker Hughes, Inc.

Not Reported in S.W.3d, 2005 WL 1906964

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