

CAUSE NO. 09-0118

**IN THE
SUPREME COURT OF TEXAS
AT AUSTIN**

IN RE: POSTEL INDUSTRIES, INC.

**From The 234th Judicial District Court
Of Harris County, Texas
Hon. Reece Rondon, Presiding**

**REPLY BRIEF ON THE MERITS
PETITION FOR WRIT OF MANDAMUS**

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TO THE HONORABLE COURT:

Relator Postel Industries, Inc. ("Postel") respectfully submits this Reply Brief on the Merits in support of Petition for Writ of Mandamus complaining of the entry of an Order of the 234th Judicial District Court of Harris County, Texas.

SUMMARY OF REPLY ARGUMENT

Despite the misguided attempts of Real Parties in Interest¹ to mischaracterize the issues in this proceeding, the sole question is whether Postel was covered on June 10, 2005, the date of the accident at issue, by the policy of workers' compensation insurance issued by Dallas National. (R. 88, ¶ 6; 110, ¶

¹ Real Parties in Interest are the family members of Juan Guadalupe Gonzalez, deceased. They are Luis Gonzalez Carmona and Maria Paramo Valle (parents), Ricardo Gonzalez (son), Lidia Gonzalez (daughter), Patricia Gonzalez (spouse), and the estate. (R. 1-2).

3). The Division² has exclusive jurisdiction to determine the answer to that question in the first instance. (R. 88, ¶ 6; 110, ¶ 3).

The appellate courts in Texas have consistently ruled that the Division has exclusive jurisdiction in workers' compensation compensability matters. See *Morales v. Liberty Mut. Ins. Co.*, 241 S.W.3d 514 (Tex. 2007). Moreover, the Texas Legislature has expressly stated, "the division of workers' compensation of the Texas Department of Insurance ... shall assist in the implementation of [The Staff Leasing Services Act]."³ TEX. LABOR CODE § 91.003(b). Real Parties in Interest ignore and did not even mention the Legislature's mandate that the Division assist in implementing the SLSA in their attempt to restrict the term "compensability" in a manner inconsistent with Texas law.

Consistent with prior opinions of this Court, the issue in this case - whether Postel had an insurance policy in effect (e.g., was there a staff leasing agreement in effect on the date of the accident) - is an issue of compensability for initial determination by the Division. The undisputed facts compel the conclusion that the trial court should have granted Postel's plea in abatement and abated the proceedings pending a ruling by the Division on whether Postel was covered by a policy of workers' compensation insurance on June 10, 2005, the date of Mr. Gonzalez's accident.

² All references in this brief to the division of workers' compensation of the Texas Department of Insurance are to the "Division."

³ All references to the Staff Leasing Services Act are to the "SLSA."

REPLY ARGUMENT & AUTHORITIES

1. **The Legislature has mandated that the division of workers' compensation of the Texas Department of Insurance shall assist in the implementation of the Staff Leasing Services Act**

Conspicuous by its absence in the response filed by Real Parties in Interest is any discussion or even a reference to the mandate of the Texas Legislature that "the division of workers' compensation of the Texas Department of Insurance ... shall assist in the implementation of [The Staff Leasing Services Act]. TEX. LABOR CODE § 91.003(b). The reason for the omission is simple - Real Parties in Interest cannot harmonize their argument in this proceeding with the statutory language.

The sole question in this case is whether Postel was covered by the policy of workers' compensation insurance issued by Dallas National during the time period of June 20, 2004 to June 20, 2005. (R. 88, ¶ 6; 110, ¶ 3). If Real Parties in Interest were correct in their argument that the trial court, not the Division, has exclusive jurisdiction to determine the answer to this question, the statutory directive in § 91.003(b) would serve no purpose. The Division's assistance in implementing the SLSA would be restricted to determining what benefits an injured worker or his family were entitled to receive under a policy of workers' compensation insurance. The Division already serves that function and there would be no need for the Legislature to remind the Division of their pre-existing obligations.

Rather, a reasonable interpretation of § 91.003(b) compels the conclusion

that the Legislature anticipated that the Division would be involved in ascertaining whether a client company was covered by the policy of workers' compensation insurance procured by the leasing company. Such a conclusion is also consistent with prior pronouncements of this Court regarding the scope of the Division's responsibility to determine issues of "compensability." See *Morales v. Liberty Mut. Ins. Co.*, 241 S.W.3d 514 (Tex. 2007).

This Court has held that, contrary to the arguments of Real Parties in Interest, the concept of "compensability has several elements, any of which may be in dispute depending upon the particular circumstances presented." *Morales*, 241 S.W.3d at 518. In *Morales*, this Court noted that while "assessing a potential employer's subscriber status concerns coverage under the Act," "the concepts of coverage and compensability are not necessarily mutually exclusive." *Id.* In fact, this Court noted several factors that should be included in the determination of compensability including "the worker's employment status" and "whether a particular employer has an insurance policy in effect." *Id.* at 519. Much like the statutory mandate contained in § 91.003(b), Real Parties in Interest fail to discuss or even mention this Court's opinion in *Morales* and the discussion of compensability contained therein.

Postel submits that any claimed distinction between the jurisdiction of the Division to determine the status of a worker as an independent contractor or an employee and the jurisdiction of the Division to determine the status of a worker as a leased or non-leased employee under the SLSA is a distinction without a

difference. In this case, the question of whether Postel had an insurance policy in effect (e.g., was there a staff leasing agreement in effect on the date of the accident), is a question of compensability that should be addressed by the Division in the first instance. Such a conclusion would be consistent with the language of § 91.003(b) and prior opinions of this Court. The trial court should have granted Postel's plea in abatement and abated the proceedings pending a ruling by the Division on whether Postel was covered by a policy of workers' compensation insurance on June 10, 2005.

2. Real Parties in Interest erroneously characterize the issue in this case.

Rather than address the Legislative mandate contained in § 91.003(b) or the scope of compensability as discussed by this Court in *Morales*, Real Parties in Interest simply typify and vilify Postel's characterization of the issue in this case. However, even cursory contemplation of Real Parties in Interest's assertion reveals its frivolity.

Real Parties in Interest contend that Postel's position in this proceeding is that the sole question is "whether Postel was covered by a policy of worker's compensation insurance" and Postel's position is "circular and nonsensical." (Response of Real Parties in Interest, p. 14). Specifically, Real Parties in Interest characterize Postel's argument as:

- 1) the Division has jurisdiction to decide coverage issues;
- 2) there is coverage in this case because Postel

complied with the SLSA; therefore

3) the Division has jurisdiction.

(*Id.*). Thus, Real Parties in Interest claim that Postel believes “the Division has jurisdiction because Postel is covered by Harbor’s insurance policy.” (*Id.*). Real Parties in Interest then make the illogical leap that Postel’s argument regarding jurisdiction presupposes an affirmative answer to the question of coverage. Real Parties in Interest are grossly distorting Postel’s claims.

Although Postel believes that it was covered by the policy of workers’ compensation insurance issued by Dallas National, Postel has never asserted that the Division has jurisdiction solely because it was in fact covered as a matter of law. Rather, Postel has consistently maintained the position that the Division has jurisdiction because the question for determination is whether Postel had a policy of workers’ compensation insurance in effect on the date of the accident at issue (e.g., was there a staff leasing agreement in effect on the date of the accident). This is a question of compensability that should be first addressed by the Division. *Morales*, 241 S.W.3d at 519 (whether a particular employer has an insurance policy in effect is question of compensability).

3. Real Parties in Interest are attempting to obscure the jurisdictional issues by focusing on issues unrelated to the jurisdictional arguments.

As anticipated by Postel in its brief on the merits, Real Parties in Interest are attempting to divert the Court’s attention from the jurisdictional issues. Specifically they claim that the contract between Harbor and Postel is

“fraudulent” because the date is wrong and they focus on perceived factual inaccuracies in Postel’s brief that are clearly explained by even a cursory review of the record.

Initially, the allegations of Real Parties in Interest ignore numerous undisputed facts that undermine their claim that the contract is invalid. Specifically, the documentation and stipulations established the following:

- Harbor contracted to provide staff leasing services to Postel whereby Harbor would hire Postel’s employees and lease the employees to Postel in accordance with the SLSA (R. 88-89);
- The contract between Harbor and Postel provides that it shall automatically renew for successive one-year terms (R. 93);
- Postel and Harbor jointly employed Mr. Gonzalez. (Real Parties in Interest Response to Petition for Writ of Mandamus, p. 1);
- On June 10, 2005, Mr. Gonzalez suffered fatal injuries when he was injured on a job site while working as a leased employee assigned by Harbor to Postel (R. 3);
- On June 10, 2005, Harbor was insured under a policy of workers’ compensation insurance issued by Dallas National with respect to all employees leased by Harbor to Postel. Harbor elected to provide such coverage to Postel (R. 88, 107, 132, 135);
- Dallas National reported Mr. Gonzalez’s accident to the Division (R. 110);

- The Division has a claim on file in connection with the injuries sustained by Mr. Gonzalez (R. 110);
- Dallas National paid and Real Parties in Interest received workers' compensation benefits on behalf of Mr. Gonzalez (R. 110, 132, 135, 154-158); and
- Dallas National, the workers' compensation insurance carrier, agrees that Postel was covered under Harbor's insurance policy (R. 137-138).

Real Parties in Interest have not challenged these undisputed facts in any manner.

Real Parties in Interest also chastise Postel because its Petition for Writ of Mandamus stated "Juan Guadalupe Gonzalez was hired by Harbor on May 14, 2002" and assigned to Postel. That factual reference was changed in the brief on the merits to state that Aerostaff Services, Inc., a different staff leasing company, actually employed Mr. Gonzalez in 2002 and he formally began working for Harbor in January of 2003. Contrary to the assertions of Real Parties in Interest, the change is easily explained.

As reflected by his paychecks, Mr. Gonzales was employed by Aerostaff Services in 2002. (SR 70-71, 309-358)⁴. Harbor⁵ became licensed as a staff

⁴ References to the Supplemental Mandamus Record are listed as SR___. The Supplemental Mandamus Record was filed with the Court on July 8, 2009.

⁵ The term Harbor refers to Maxtemp, Inc., Harbor Texas, Inc., Harbor America Texas, Inc., and Harbor America Central, Inc. These names identify the same corporation that had the same staff leasing license number. (SR 237-245).

leasing company in November of 2002. (SR 70-71). Harbor then purchased the assets of Aerostaff Services. (SR 70-71). Mr. Gonzalez began formally working for Harbor in January of 2003. (SR 71, 360). Mr. Gonzalez's 2003 paychecks establish that Gonzalez worked for Harbor during the entirety of 2003. (SR 360-411). Harbor leased Mr. Gonzalez to Postel to perform iron working/welding services. (R. 90,108).

Most importantly, the error in dates does not (or should not) affect the fundamental issue of the jurisdiction of the Division to assist in implementing the provisions of the SLSA and determine the issue of compensability - whether Postel was covered by a policy of workers' compensation insurance on the date of the accident.

CONCLUSION & PRAYER FOR RELIEF

The undisputed facts establish that the only legitimate question in this proceeding is whether Postel was covered by a policy of workers' compensation insurance on the date of the accident at issue (e.g., whether there was a valid staff leasing arrangement between Postel and Harbor). This question goes to the very heart of the jurisdiction of the Division and must be brought, in the first instance, before the Division because the Division has primary and exclusive jurisdiction, subject to judicial review, to determine the elements of compensability.

The trial court erred and/or clearly abused its discretion in denying Postel's plea in abatement. The trial court's erroneous denial of Postel's plea in

abatement justifies mandamus relief because it effects a judicial usurpation of the Division's authority and is a disruption of the "orderly processes of government."

In re Entergy, 142 S.W.3d 316, 321 (Tex. 2004).

Accordingly, Relator Postel Industries, Inc. respectfully prays that this Court:

- (1) Grant this Petition for Writ of Mandamus;
- (2) Direct the trial court to vacate or set aside the November 21, 2008 Order and enter an Order compelling abatement of the underlying action; and
- (3) Grant any other relief to which Relator is justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this pleading was served via overnight courier upon the following persons on this 17th day of August, 2009 to:

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