SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1916-15T4
A-0022-16T4

ANTOINE D. MINTER,

Plaintiff-Respondent,

v.

WILLIAM K. MATTSON, DAN BEGGS, JOHN LEAR, FRIENDS HOME AT WOODSTOWN and/or VILLAGE AT WOODSTOWN, MORRISON SENIOR DINING, A DIVISION OF MORRISON MANAGEMENT SPECIALISTS, INC.,

Defendants-Respondents,

and

MANUFACTURERS ALLIANCE INSURANCE COMPANY,

Defendant-Appellant.

ANTOINE D. MINTER,

Plaintiff-Appellant,

v.

WILLIAM K. MATTSON, FRIENDS HOME AT WOODSTOWN and/or VILLAGE AT WOODSTOWN,

Defendants,

and

DAN BEGGS, JOHN LEAR, MORRISON SENIOR MANAGEMENT SPECIALISTS, INC. and MANUFACTURERS ALLIANCE INSURANCE COMPANY,

Defendants-Respondents.

Argued October 2, 2017 – Decided May 10, 2018

Before Judges Ostrer, Whipple and Rose.

On appeal from Superior Court of New Jersey, Law Division, Salem County, Docket No. L-0087-14.

Patrick W. Conner argued the cause for Manufacturers Alliance Insurance Company, appellant in A-1916-15 and respondent in A-0022-16 (Law Offices of Monique T. Moran, attorneys; Patrick W. Conner, on the briefs).

Mati Jarve argued the cause for Antoine D. Minter, appellant in A-0022-16 and respondent in A-1916-15 (Jarve Kaplan Granato Starr, LLC, attorneys; Mati Jarve and Katherine M. Jarve, on the briefs).

Jennifer A. Hindermann argued the cause for respondent William K. Mattson in A-1916-15 (Cooper Maren Nitsberg Voss & DeCoursey, attorneys; Jennifer A. Hindermann, on the brief).

Michael E. Sullivan argued the cause for respondent Friends Home at Woodstown and/or Friends Village at Woodstown in A-1916-15 (Parker McCay, PA, attorneys; Michael E. Sullivan, on the brief).

Aaron K. Kirkland (Shook Hardy & Bacon) of the Missouri bar, admitted pro hac vice, argued the cause for respondents Dan Beggs, John Lear

and Morrison Management Specialists, Inc. in A-0022-16 (Methfessel & Werbel, attorneys; Charles T. McCook, Jr. and Aaron K. Kirkland, on the brief).

PER CURIAM

In these back-to-back appeals, which we consolidate for our opinion, we determine that the trial court properly exercised its concurrent jurisdiction, and correctly decided that plaintiff Antoine Minter, a kitchen worker, was acting in the course of covered employment under the Workers' Compensation Act, N.J.S.A. 34:15-1 to -146, with respect to his employer, Friends Village at Woodstown, a continuing care retirement community (CCRC).[1] However, we part company with the court's decision that Minter was also a special employee of an outside food service management contractor, Morrison Senior Dining, which the Village retained to supervise its dining operation.

I.

Minter was injured during a journey to work undertaken at the behest of his supervisors. It had been snowing since the previous night, and Minter's regular morning bus to work was not running. Minter called his supervisor, Dan Beggs, the executive chef, to say he would miss his early morning shift. That was a problem for

[1] The CCRC is also identified as Friends Home at Woodstown. For convenience, we will refer to it as "the Village."

the dining director, John Lear, because food service was essential, and the Village was short-staffed that day because of the snow.

Lear came up with a plan to get Minter to work. At Lear's behest, Beggs told dining supervisor, William Mattson, to come in earlier than his 10:30 a.m. shift, and pick up Minter on the way.[2] According to Minter, Mattson called, reported that Beggs said they both "had to come to work" and Beggs told him to pick up Minter. Minter accepted the ride. At that point, he believed he would be fired if he refused. Minter knew he was deemed an essential employee. Also, Beggs previously had given him a verbal warning for showing up late.

Critical to the "special employer" issue, the Village had hired Morrison to manage its dining operations and its various dining-related employees. Lear and Beggs were Morrison's only employees on site at the Village. Morrison presented no evidence that Minter was aware that Lear and Beggs worked for an outside company. Minter received his paychecks from the Village, which hired him. Beggs was Minter's supervisor and controlled his work, although Minter, given his low-level position, took orders from

[2] Minter and Mattson lived in the same town. Minter said that Mattson gave him a ride to work about twice a week. Mattson testified he only occasionally drove Minter home. In any event, it was undisputed that on the day of the accident, Mattson drove Minter at his employer's behest.

others. Beggs reviewed Minter's performance, but the Village retained the power to fire or discipline him.

It was still snowing as Mattson and Minter headed to work around 7:30 a.m. Travelling on a snow-and-ice-packed road, Mattson lost control of his car. It entered the path of an oncoming pick-up truck, which struck the passenger side of Mattson's vehicle. Minter suffered two broken legs, fractured ribs, and a deep laceration to his left arm.

A few months after the accident, plaintiff filed suit against Mattson. After three amendments, he added the Village, Lear, Beggs, Morrison, and Manufacturers Alliance Insurance Company, the Village's workers' compensation insurer. Before Manufacturers was added, the Village and Mattson filed separate motions seeking summary judgment dismissal on the ground that Minter was acting within the course of his employment and his exclusive remedy was under the Compensation Act. Minter initially opposed the motion. The court deferred its decision pending Minter's deposition and the completion of discovery.

In light of that discovery, Minter withdrew his opposition and filed a petition in the Division of Workers' Compensation. Manufacturers then asserted that Minter was not acting in the course of employment when the accident occurred. Minter secured permission to add Manufacturers as an indispensable party to the

lawsuit, after contending that he risked inconsistent decisions in the two pending matters.

Thereafter, the court decided several dispositive motions. The court denied Manufacturers' motion to dismiss the complaint and transfer the matter to the Division to determine whether Minter was acting within the course of employment when the accident occurred. Instead, the court held that it had concurrent jurisdiction to reach that threshold issue, which Mattson and the Village had raised in their renewed motions for summary judgment. At that point, Beggs, Lear, and Morrison had joined in the motion. The court held that Minter was acting within the course of employment. On that ground, the court dismissed the complaint, so Minter could pursue his exclusive remedy under the Compensation Act before the Division. The court denied Manufacturers' subsequent reconsideration motion.

Several months later, upon a motion by Morrison, Lear, and Beggs, the court held that Morrison was a special employer, and that Minter's remedy against those three defendants lay under the Compensation Act. The court later denied Minter's motion for reconsideration.

Manufacturers appeals (A-1916-15), contending the court lacked jurisdiction to decide, and then erroneously decided, the

employment status issue. Minter appeals (A-0022-16) from the court's determination that he was Morrison's special employee.[3]

II.

We first consider Manufacturers' jurisdictional argument. Manufacturers contends the court should have dismissed the claim against it, because the Division has "primary jurisdiction over plaintiff's employment status."

The doctrine of primary jurisdiction applies "'when a case is properly filed in the Superior Court but the court declines original jurisdiction, referring specific issues to the appropriate administrative body.'" Estate of Kotsovska, ex rel. Kotsovska v. Liebman, 221 N.J. 568, 588 (2015) (quoting Maqic Petroleum Corp. v. Exxon Mobil Corp., 218 N.J. 390, 405 (2014)). Manufacturers does not argue the trial court lacked the power to decide whether Minter was acting in the course of employment.[4]

---

[3] We granted Manufacturers' motion for leave to appeal. But, we ultimately delayed argument, so its appeal could be heard back-to-back with Minter's appeal.

[4] Manufacturers' point heading states, "THE TRIAL COURT SHOULD HAVE HELD THE WORKERS COMPENSATION COURT HAS PRIMARY JURISDICTION OVER PLAINTIFF'S EMPLOYMENT STATUS." We recognize that Manufacturers' argument then begins with the statement, "Generally, the Workers' Compensation Court has primary and/or the exclusive jurisdiction of all claims for workers' compensation benefits." (Emphasis added). However, we may "confine our address of the issues to those arguments properly made under appropriate point headings." Almog v. Israel Travel Advisory Serv., Inc., 298

The Supreme Court has held, "'Despite the exclusivity of the workers' compensation remedy, the Superior Court has jurisdiction to determine the existence of the employment relationship and such other employment issues as are raised by way of defense to the employee's tort action.'" Kotsovska, 221 N.J. at 587 (quoting Pressler & Verniero, Current N.J. Court Rules, cmt. 42.1 on R. 4:5-4 (2014)). The Supreme Court distinguished between whether jurisdiction exists, and whether the court should exercise it. The Court stated, "Having determined the Superior Court had jurisdiction, we next consider whether . . . the trial court erred in declining to transfer plaintiff's claim to the Division under the doctrine of primary jurisdiction." Id. at 587-88.

In essence, Manufacturers contends the trial court erred by failing to stay its hand. That was a discretionary decision. Id. at 588. We may disturb it on appeal only if it was "made without a rational explication, inexplicably departed from established practices, or rested on an impermissible basis." Ibid. (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

N.J. Super. 145, 155 (App. Div. 1997). Furthermore, aside from its qualified reference to exclusive jurisdiction, Manufacturers' argument only addresses the doctrine of primary jurisdiction.

The Supreme Court has applied a four-part test for ascertaining whether a court should apply the primary jurisdiction doctrine:

> 1) whether the matter at issue is within the conventional experience of judges; 2) whether the matter is peculiarly within the agency's discretion, or requires agency expertise; 3) whether inconsistent rulings might pose a danger of disrupting the statutory scheme; and 4) whether prior application has been made to the agency.
>
> [Ibid. (quoting Maqic Petroleum, 218 N.J. at 407.]

Applying those factors, we discern no abuse of discretion. First, the issue whether a person has acted within the course of employment is not outside a judge's conventional experience. "[A] workers' employment status is a matter that is often determined by trial judges and juries." Ibid. We recognize that whether a person is an employee (as distinct, say, from an independent contractor) is different from whether that employee was acting in the course of his or her employment — the issue in this case. However, a court is equally well-equipped to resolve either question. See, e.g., Kasper v. Bd. of Trs. of the Teachers' Pension & Annuity Fund, 164 N.J. 564, 573 (2000) (determining whether an employee was disabled as a "direct result of a traumatic event occurring during and as a result of the performance of his [or her] regular or assigned duties"); see also 9 Lex K. Larson,

Larson's Workers' Compensation § 102.06 (Mathew Bender Rev. Ed. 2017) (describing as a "very questionable distinction" a court's determination that it had jurisdiction over employment status but not course of employment).

The Division certainly has a wealth of experience addressing course-of-employment issues. But, if the facts are not genuinely disputed, the case calls for a legal determination that is not within the agency's peculiar expertise. See 9 Larson, § 102.06 (suggesting board priority except in those cases "in which the facts are so one-sided that the issue is no longer one of fact but one of law").[5] Furthermore, the determination of a legal issue is not a discretionary decision.

As for the third factor, had the trial judge stayed her hand, there would have been a risk of inconsistent rulings. We recognize that the Court in Kotsovska perceived no such risk because the petitioner had not filed a petition with the Division. 221 N.J. at 591. By contrast, Minter belatedly did.

Nonetheless, only the court had the authority to force resolution of the issues as to all parties, particularly Minter's

[5] Notably, an appellate court will defer to the factual findings of the Judge of Workers' Compensation, see Sager v. O.A. Peterson Constr., Co., 182 N.J. 156, 163-64 (2004), but exercise de novo review of his or her legal rulings, see Sentinel Ins. Co. v. Earthworks Landscape Constr., LLC, 421 N.J. Super. 480, 485-86 (App. Div. 2011).

alleged co-employees, Mattson, Beggs, and Lear. Although Morrison could have intervened as of right in the Division proceeding against the Village, see Kristiansen v. Morgan, 153 N.J. 298, 311 (1998) (stating alleged special employer may intervene as of right), and Minter was entitled to join Morrison, N.J.A.C. 12:235-3.6, the co-employees' participation in the Division proceeding was up to them. A co-employee may permissively intervene in a Division proceeding, but the "[c]hoice will remain with the claimed co-employee to refuse to intervene." Wunschel v. City of Jersey City, 96 N.J. 651, 666 (1984); see also Kristiansen, 153 N.J. at 310-11 (stating "[t]he Division acquires jurisdiction over a fellow employee only if he or she elects to voluntarily submit to the [Division's] jurisdiction"). Had the court stayed its hand in the Division's favor, the co-employees' status could have returned to the court, risking a result at odds with the Division's decision as to the Village and Morrison.

Fourth, there was no prior application made to the agency. We presume this factor promotes an interest in conserving judicial and agency resources. A court should be more willing to stay its hand if the agency has already started adjudicating the dispute. Here, Minter first turned to the court to resolve his claim. The Village raised the defense that Minter's claim was barred by the Compensation Act. The court declined to rule on an initial round

of dispositive motions concerning the Compensation Act; the parties thereafter engaged in extensive discovery; and only then did Minter, apparently protectively, file his workers' compensation petition. Manufacturers has presented no evidence that the Division's case had progressed beyond the initial petition and answer, when the court granted summary judgment.

In sum, the four factors did not compel the trial court to yield to the Division's primary jurisdiction. The doctrine is intended to achieve two goals: "to (1) 'allow an agency to apply its expertise to questions which require interpretation of its regulations,' and (2) 'preserve uniformity in the interpretation and application of an agency's regulations.'" Nordstrom v. Lyon, 424 N.J. Super. 80, 99 (App. Div. 2012) (quoting Muise v. GPU, Inc., 332 N.J. Super. 140, 159, 160 (App. Div. 2000)). Referring the course-of-employment issue to the Division would not have substantially furthered those goals.

III.

We also discern no error in the court's determination that Minter was acting in the course of his employment when the accident occurred. We review the trial court's grant of summary judgment de novo, applying the same standard as the trial court under Rule

4:46-2(c). Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 329-30 (2010).[6]

We first review the governing legal principles. The Compensation Act provides an exclusive remedy for injuries sustained in an "accident arising out of and in the course of employment . . . ." N.J.S.A. 34:15-7. Generally, the Compensation Act covers accidents on the employer's premises. "Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment . . . ." N.J.S.A. 34:15-36. This so-called "premises rule" generally bars compensation for accidents during a worker's travel to and from work. Zelasko v. Refrigerated Food Express, 128 N.J. 329, 336 (1992).[7]

[6] Our review is hampered by Manufacturers' failure to comply with Rule 2:6-1(a)(1), which requires submission, on an appeal from a summary judgment, "a statement of all items submitted to the court on the summary judgment motion," and inclusion of all such items other than briefs, unless permitted by Rule 2:6-1(a)(2).

[7] The statute provides exceptions when the employer requires the employee "to be away from the employer's place of employment"; the employer pays an employee "travel time . . . for time spent traveling to and from a job site"; or the employee uses an "employer authorized vehicle" for travel to and from "a job site." N.J.S.A. 34:15-36. We need not explore the limits of these exceptions, as the parties do not contend they apply.

However, the Supreme Court has recognized an exception to the rule. The Supreme Court has held that "when an employer directs or requires an employee to undertake an activity, 'that compulsion, standing alone, brings an activity that is otherwise unrelated to work within the scope of employment.'" Sager, 182 N.J. at 163 (quoting Lozano v. Frank Deluca Constr., 178 N.J. 513, 532 (2004)). To prove compulsion, "the injured employee must establish that he or she engaged in the activity based on an objectively reasonable belief that participation was required." Lozano, 178 N.J. at 518. "Whether an employee's belief is objectively reasonable, will depend largely on the employer's conduct . . . ." Id. at 534. The Court identified a non-exclusive list of factors relevant to the determination:

> whether the employer directly solicits the employee's participation in the activity; whether the activity occurs on the employer's premises, during work hours, and in the presence of supervisors, executives, clients, or the like; and whether the employee's refusal to attend or participate exposes the employee to the risk of reduced wages or loss of employment.
>
> [Id. at 534.]

An employee's subjective impression of compulsion alone is not sufficient. Id. at 534-35.

The trial court concluded that under the Sager-Lozano "compelled activity" exception, Minter was engaged in the course of employment. We agree.

Certainly, the compelled activities in Lozano and Sager differ from the compelled activity in Minter's case. In Lozano, the employer alleged he was compelled to drive a go-kart at the premises of the employer's customer, and was injured while doing so. 178 N.J. at 517. In Sager, the employee was compelled to travel away from a construction work site to take a meal, and was injured on his return. 182 N.J. at 158. The Court highlighted the recreational and social nature of those types of activities, stating, "when an employer compels an employee's participation in an activity generally viewed as recreational or social in nature, the employer thereby renders that activity work-related as a matter of law." Lozano, 178 N.J. at 518.

By contrast, Minter was injured during a journey to work at his usual workplace. He was not engaged in a recreational or social activity. Yet, the Court did not limit its holding to only activities that would "ordinarily be considered recreational or social in nature . . . ." Lozano, 178 N.J. at 531. Rather, the Court referred more generally to "an activity that is otherwise unrelated to work . . . ." Id. at 532. Notably, Sager did not suffer his injury at the compelled "social activity" — the meal.

He was injured during the journey back from the meal. Based on that initial compulsion, his injury was determined to have occurred during the course of employment.[8] The key is whether an employer compelled the employee's participation.

In one sense, travel to and from work is always compelled. Employers set work schedules and employees are generally expected to comply. Those who do not comply usually risk losing their jobs. But, the compulsion in Minter's case was specific and exceptional. Minter had already called out for the day. Thus, if he could establish that his employer compelled his non-work-related activity — the journey to work in a co-worker's vehicle on a day he had already announced he would not work — the accident would be covered.[9]

---

[8] Initially, Sager was headed back to the New York job site, where he was working a longer day than usual because the bridges and tunnels to New Jersey were closed on September 11, 2001. During the trip from the diner, the bridges were opened, and Sager's supervisor and driver decided to convert the trip from one destined to work, into one destined for home. Sager, 182 N.J. at 159-61.

[9] Employment also commences during travel when an employer requires an employee "to travel in a ridesharing arrangement as a condition of employment." N.J.S.A. 34:15-36. "Ridesharing" includes "carpools." Ibid. Arguably, Minter was so compelled to carpool to work with Mattson. The same legislation that added the ridesharing provision to the Compensation Act — the New Jersey Ridesharing Act of 1981 — defined "car pool" to mean "two or more persons commuting on a daily basis to and from work by means of a vehicle with a seating capacity of nine passengers or less." See L. 1981, c. 413, § 3. There is no evidence that Mattson and Minter

Turning to the factual record, we reject Manufacturers' contention that there remained a genuine issue of material fact as to whether Minter was compelled to travel to work the day of the snowstorm. Minter had an objectively reasonable belief that his presence at work was compelled.

"When an employer directly commands an employee to engage in an activity, it is axiomatic that the employee has been compelled." Lozano, 178 N.J. at 534. According to Minter, Mattson told him that Beggs said that he had to come in during the snowstorm. Even if Beggs did not give a direct order to Minter to come in, Minter had an objectively reasonable belief that his appearance was compelled. Beggs and Mattson "directly solicit[ed]" Minter's travel to work in the snow on a day he had already called out. See ibid. Beggs and Mattson testified that Minter was asked, not expressly ordered, to come in. Mattson testified that Beggs "asked me if I could give [Minter] a ride to work." And Beggs testified that he "asked . . . Mr. Minter . . . if he can come in if [Mattson] picked him up. And he said yes." After Beggs secured Mattson's

---

commuted together daily. However, the Ridesharing Act did not include the definition of "carpool" in Title 34, although it did include the definition of "ridesharing." See L. 1981, c. 413, § 6. As the parties did not raise the ridesharing provision, we simply note it without deciding whether it would serve as an alternative basis for finding coverage under the Compensation Act.

cooperation, Beggs testified that he called Minter again and said, "'[Mattson]'s going to pick you up. And he said okay.'"

Despite his supervisor's testimony that Minter may have had a choice in the matter, the record evidence establishes Minter had an objectively reasonable belief that he was required to accept Mattson's ride and show up for work in the snowstorm. Minter's refusal would have "expose[d] [him] to the risk of . . . loss of employment." Ibid. "[C]onsidering the imbalance of power between the employer and employee, we cannot ignore the reality that indirect pressure on an employee can be as powerful as an explicit order." Ibid.; see also Sager, 182 N.J. at 166-67 (noting employees' sense of obligation to comply with supervisor's requests).

It is ultimately not material whether Beggs directed or "asked" Minter to come into work. Nor does it matter that there was no written policy that he would be fired if he did not. Minter understood that he was an essential employee, like all other kitchen staff members. He was so informed when he was hired. Beggs and Lear confirmed that in their depositions. The Village residents had to be fed. Beggs stated that "all hands [were to be] on deck in emergencies" like the snowstorm the day of the accident. Once Beggs secured a ride to work for Minter, he had no justifiable excuse for refusing. Beggs admitted that if Minter

refused, he would have referred the matter to Human Resources. Minter said he believed he would have been fired if he refused. It was a reasonable belief.

In sum, Minter was injured in the course of his employment, despite the fact that he was not yet at his employer's premises, because his employer had compelled his travel to work with a co-worker on a day he had already informed his employer he was not going to come in.

IV.

We now turn to the trial court's determination that Morrison was Minter's special employer. Minter argues that Morrison was not his special employer because he was unaware that Beggs and Lear worked for Morrison; the Village paid him and exercised ultimate control over his hiring and firing; and his duties were separate from those of the Morrison employees.[10] We agree there is insufficient evidence to conclude Morrison was Minter's special employer.

[10] Although Minter included in his notice of appeal the court's denial of his motion for reconsideration, he did not address the point in his brief on the merits. Minter thereby waived the argument that the motion for reconsideration was wrongly decided. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) (stating that "[a]n issue not briefed on appeal is deemed waived"). Minter's effort to raise the issue in reply is ineffective. See Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 596 (App. Div. 2001) (stating it is improper to raise an issue for the first time in a reply brief).

A.

An employee can have two employers under workers' compensation, both of whom may enjoy the benefit of the Compensation Act's exclusive remedy. Walrond v. Cty. of Somerset, 382 N.J. Super. 227, 234 (App. Div. 2006); Blessing v. T. Shriver and Co., 94 N.J. Super. 426, 429-30 (App. Div. 1967). The doctrine has often been applied where an employee of one company was "lent" to a second company. Walrond, 382 N.J. Super. at 234-35. The employer of a building trades worker may assign its employee to work at a construction site under the control of a second company. See, e.g., Volb v. G.E. Capital Corp., 139 N.J. 110, 116-17 (1995); Santos v. Standard Havens, Inc., 225 N.J. Super. 16, 18-21 (App. Div. 1988). Or an employee of a staffing company may be assigned to work for — and submit to the control of — the staffing company's client. See, e.g., Kelly v. Geriatric & Med. Servs., Inc., 287 N.J. Super. 567, 578 (App. Div.) (holding that geriatric facility was special employer of nurse assigned to it by staffing agency), aff'd o.b., 147 N.J. 42 (1996); Antheunisse v. Tiffany & Co., 229 N.J. Super. 399, 405 (App. Div. 1988) (holding that Tiffany was special employer of holiday season packing department worker assigned to it by personnel agency).

Whether a second company is considered a worker's "special employer" subject to the Compensation Act depends on a non-exclusive list of five factors:

> (1) the employee has made a contract of hire, express or implied, with the special employer;
>
> (2) the work being done by the employee is essentially that of the special employer;
>
> (3) the special employer has the right to control the details of the work;
>
> (4) the special employer pays the employee's wages; and
>
> (5) the special employer has the power to hire, discharge or recall the employee.
>
> [Kelly, 287 N.J. Super. at 571-72.]

Although the Supreme Court affirmed Kelly, which articulated the five-factor test, the Court has also described the special employer test as consisting of only the first three factors. See Volb, 139 N.J. at 116. Those three factors constitute the test articulated by Professor Larson. See 5 Larson, § 67.01; Blessing, 94 N.J. Super. at 430 (quoting Larson's three-factor test). We therefore surmise that the fourth and fifth factors are secondary to the first three.

There is some uncertainty as to whether all five factors must be established. The panel in Walrond stated, "No single factor is 'necessarily dispositive, and not all five must be satisfied

in order for a special employment relationship to exist.'" 382 N.J. Super. at 236 (quoting Marino v. Ind. Crating Co., 358 F.3d 241, 244 (3d Cir. 2004)). The federal court in Marino relied on Blessing, which stated, "'The rules and tests are not so hard and fast and inexorable that they must be present and controlling en masse in every case before the employment relationship, as defined and contemplated by the statute, can be declared.'" 94 N.J. Super. at 434 (quoting Long v. Sims Motor Transport Lines, 117 N.E.2d 276, 278 (Ind. App. Ct. 1954)).

On the other hand, the Supreme Court in Volb quoted the Larson formulation, which lists the three factors in the conjunctive and states that a special employer is liable under the Compensation Act "'only if'" all three factors are met. Volb, 139 N.J. at 116 (quoting Blessing, 94 N.J. Super. at 430 (quoting 1A Arthur Larson, Workmen's Compensation § 48.00 (1966)). We also have adopted Larson's "only if" formulation, specifically finding that factor one — a contract of hire — was "essential." Murin v. Frapaul Const. Co., 240 N.J. Super. 600, 607-08 (App. Div. 1990). We explained, "An employee's consent is required because the employee loses certain rights along with those he gains when he enters a new employment relationship." Id. at 608.[11]

[11] Murin echoed Larson's reasoning:

The Supreme Court has expressly stated that "the most important factor in determining a special employee's status is whether the borrowing employer had the right to control the special employee's work . . . ." Volb, 139 N.J. at 116; see also Blessing, 94 N.J. Super. at 430-31 (stating that "[t]he sheer weight of authority is undoubtedly on the side of 'control'"). However, the Court also has recognized — in a case not involving special employers — that the nature of the work, as opposed to control, may be a more important factor in establishing an employment relationship under the Compensation Act. See Kotsovska, 221 N.J. at 593-94.

As we highlighted in Walrond, the "special employer" analysis must remain tethered to the terms of the Compensation Act, which makes financial consideration an essential element of the covered employment relationship. The statute defines an "employee" as "synonymous with servant, and includes all natural persons . . . who perform service for an employer for financial consideration

---

> The need for a contract to hire in the lent employee situation is based on the fact that the employee loses certain rights along with those gained when striking up a new employment relation. Most important of all, he or she loses the right to sue the special employer at common law for negligence . . . .
>
> [5 Larson, § 67.02.]

. . . ." 382 N.J. Super. at 238 (quoting N.J.S.A. 34:15-36). Such consideration may be indirect, as is typical of lent employment situations, where the borrowing employer pays the lending employer, who then pays the worker. Id. at 237-38. Whether direct or indirect, "[s]ervice performed in exchange '"for financial consideration" is a cardinal legal requirement in [workers'] compensation for the creation of the status of employer and employee.'" Id. at 238 (quoting Goff v. Cty. of Union, 26 N.J. Misc. 135, 138 (Dept. Labor 1948)).

In Walrond, we rejected a claim that a county police academy was a municipal police officer's special employer because the academy did not directly or indirectly pay the officer for his week-long teaching stint at the academy. 382 N.J. Super. at 240-41. We concluded that the officer was a volunteer, and was not subject to the Compensation Act's exclusivity provision. Thus, he was entitled to prosecute a negligence claim against the academy. Ibid.

B.

Applying these principles, we are unpersuaded that Morrison has met its burden to establish that Minter was its special employee. See Drake v. Cty. of Essex, 192 N.J. Super. 177, 179-80 (App. Div. 1983) (stating that "burden of proving" a plaintiff's eligibility for workers' compensation rests upon the defendant who

is "asserting the affirmative defense of an exclusive remedy under workers' compensation").

We begin with the "financial consideration" factor, which we viewed in Walrond as a threshold statutory requirement. Morrison has failed to demonstrate that it provided any financial consideration, directly or indirectly, to Minter. It was undisputed that the Village paid Minter's wages. There is no record evidence that Morrison was the indirect source of those wages. In the usual case, as we have discussed, the special employer pays the general or lending employer, which then pays the worker. See Walrond, 382 N.J. Super. at 237-38. In this case, the flow of money is reversed. The Village, Minter's general employer, paid Morrison for its managerial services and also paid Minter directly for his employment. Thus, Morrison failed to satisfy a statutory prerequisite of an employment relationship under the Compensation Act.

Even if we put aside the "financial consideration" factor, Morrison's claim falls short. Turning to the first of the three special employment factors, Morrison failed to establish that Minter had an express or implied contract for hire with Morrison. Essential to the contract is consent. See Murin, 240 N.J. Super. at 607-08 (emphasizing the importance of consent requirement and whether the employee understood he or she would be subject to

second employer's direction); Blessing, 94 N.J. Super. at 436 (stating that "a showing of a deliberate and informed consent by the employee" is required before an implied contract can be found); 6 Larson, § 67.02 (stating that "most courts have required a showing of a deliberate and informed consent by the employee").

In the typical employment lending situation, the lent employee does not enter into an express contract of hire. But, one is often implied because the employee voluntarily accepts his or her general employer's assignment to the distinct premises of the special employer. See Kelly, 287 N.J. Super. at 574-75 (finding implied contract for hire where nurse accepted assignment to geriatric facility); Antheunisse, 229 N.J. Super. at 404 (finding an implied contract for hire where lent employee knew she was hired out to Tiffany; she could have refused the assignment; but she voluntarily reported to work at Tiffany and thereafter accepted Tiffany's direction and control).

However, even where a general employee is assigned to another site, a contract for hire is not automatically implied. For example, in Blessing, we declined to find a contractual relationship between a security guard and the company that hired the guard's security firm. 94 N.J. Super. at 436. We found "nothing in the record upon which to predicate a finding of

knowledgeable consent or a fair inference that an employment relationship between those parties existed." Ibid.

Here, Morrison has failed to establish that Minter had any knowledge that Morrison, as a distinct entity, even existed. Notably, Morrison was not located at a separate location that might have triggered an awareness of another employer. Rather, Morrison's direct employees, Lear and Beggs, were integrated into the fabric of the Village workplace.

In sum, Morrison failed to prove Minter's knowing and voluntary consent. Therefore, Morrison failed to establish an express or implied contract of hire. If we accept the principle that Morrison may be deemed a special employer "only if" it satisfies all three factors, then Morrison's claim of special employer status must fail on this ground as well.

However, assuming for argument's sake that no single factor is dispositive, the remaining factors do not tip the balance in Morrison's favor. Turning to factor two, Minter's work was no more the work of Morrison than it was the work of the Village. While Morrison was contractually bound to manage the Village's dining services, the Village was independently responsible to its residents to provide meals. Minter's role was deemed essential to that work.

Factor three does not clearly favor a finding that Morrison was a special employer. While Morrison, through Beggs and Lear, provided Minter's day-to-day supervision and therefore may have controlled his work, the Village retained the right to hire and terminate its kitchen employees like Minter, and to set the terms of their employment. Indeed, Beggs admitted that if Minter failed to appear for work the day of the accident, he would have referred the issue to the Village's human resources department to determine appropriate disciplinary action.

Finally, the fourth and fifth factors disfavor a finding of special employment. Morrison did not pay Minter's wages, nor did it have the power to hire or fire him.

In sum, we conclude the trial court erred in finding that Morrison was Minter's special employer. In light of that conclusion, we need not address Minter's remaining points.

Affirmed as to A-1916-15, and reversed and remanded as to A-0022-16. We do not retain jurisdiction.