OROZCO, MARIANA RE: FILIBERTO SERNA DEC'D	*	**NO. 2018-CA-0274**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
FILSER CONSTRUCTION & ARIES BUILDING SYSTEMS, INC.	* * * * * * *	**STATE OF LOUISIANA**

APPEAL FROM
THE OFFICE OF WORKERS' COMPENSATION
NO. 14-05423, DISTRICT "1"
Honorable Shannon Bruno Bishop, Workers Compensation Judge
* * * * * *

Judge Rosemary Ledet

* * * * * *

(Court composed of Chief Judge James F. McKay, Judge Terri F. Love, Judge Roland L. Belsome, Judge Rosemary Ledet, Judge Tiffany G. Chase)

LOVE, J., CONCURS IN PART AND DISSENTS IN PART AND ASSIGNS REASONS

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REVERSED AND REMANDED

OCTOBER 3, 2018

This is a workers' compensation case arising out of the death of Filiberto Serna, Jr. ("Serna Jr."). This case has been before this court on two prior occasions;[1] this is the third appeal by the plaintiffs, Serna Jr.'s alleged dependents—Mariana Orozco ("Ms. Orozco") and Aggie Filiberto Serna Orozco ("Aggie") (collectively, the "Claimants"). The defendants are Filiberto Serna, Sr. ("Serna Sr."), doing business as Filser Construction ("Filser"), and Aries Building Systems, Inc. ("Aries") (collectively the "Defendants").

In this appeal, the Claimants contend that the Office of Workers' Compensation Judge (the "OWC") erred in determining that the Defendants rebutted the presumption of employment set forth in La. R.S. 23:1044. Alternatively, the Claimants contend that the OWC erred in failing to find that Serna Jr.'s work fell within the exception set forth in La. R.S. 23:1021(7) for an independent contractor performing manual labor.

Finding the OWC manifestly erred in failing to find the manual labor exception applies, we reverse and remand.

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[1] *Orozco v. Aries Bldg. Sys., Inc*., 16-0187 (La. App. 4 Cir. 9/28/16), 202 So.3d 1018, *writ denied*, 16-1949 (La. 12/16/16), 212 So.3d 1173 ("*Orozco I*"); and *Orozco v. Aries Bldg. Sys., Inc*., 17-0656 (La. App. 4 Cir. 1/24/18), ___ So.3d ___, 2018 WL 525656. ("*Orozco II*").

FACTUAL AND PROCEDURAL BACKGROUND

On September 21, 2013, Serna Jr. was killed in a construction accident while attempting to move a series of trailers located at the United States Navy facility in Belle Chasse, Louisiana. At that time, Serna Jr. was working for Filser, an unincorporated construction company owned and operated by Serna Jr.'s father, Serna Sr. Filser was performing work for Aries; Aries, in turn, was performing work for the United States Navy.[2]

The Claimants filed a disputed claim for compensation, seeking death benefits, against the Defendants.[3] The Claimants alleged that Filser was Serna Jr.'s employer and that Aries was his statutory employer. Filser and Aries separately answered. Both Filser and Aries contended that Serna Jr. was working as an independent contractor at the time of the accident and that he was not an employee of either company. Aries additionally contended that Serna Jr. was a partner of Filser.

A one-day trial was held before the OWC. Serna Sr. and Ms. Orozco were the only two witnesses who testified.[4] Following the trial, the OWC, agreeing with

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[2] The parties stipulated to the following: (1) that Serna Jr. was performing work pursuant to a contract with the United States Navy and Aries; and (2) that Serna Jr. died as a result of an accident that occurred when he was removing a trailer.

[3] On August 15, 2014, Ms. Orozco filed a disputed claim for compensation as Serna Jr.'s alleged wife. On November 13, 2014, Ms. Orozco filed an amended claim adding Aggie as a claimant.

[4] In *Orozco I*, we summarized the trial testimony of the two witnesses. The pertinent testimony is as follows:

> [Ms.] Orozco testified as follows. She and Decedent [Serna Jr.] lived together in Houston, Texas for approximately two years, and while she considered him her husband, they never married. [Ms.] Orozco and Decedent had one child together, Aggie. [Ms.] Orozco and Decedent shared a joint checking account, and Orozco and Aggie were dependent on Decedent for all of their income. Serna, Sr., through Filser, would periodically issue checks payable to [Ms.] Orozco if Decedent was away from Houston and [Ms.] Orozco needed money. [Ms.] Orozco testified that all checks corresponded to the work that Decedent

Aries, classified Serna Jr. as a partner and rendered judgment in Aries' favor. On the Claimants' first appeal, we reversed, as manifestly erroneous, the OWC's finding that Serna Jr. was a partner of Filser. *Orozco I*, *supra*.[5]

> performed for Filser, but she did not know what specific work Decedent had done respective to each check. . . .
>
> [Ms.] Orozco admitted at trial to underreporting Decedent's income from Filser on their 2013 joint tax return, which was filed by [Ms.] Orozco after Decedent's death. [Ms.] Orozco explained that she underreported the income in order to receive a larger tax refund. With respect to the 2012 joint tax return, [Ms.] Orozco denied knowledge that the tax return reported that Decedent had a construction business. [Ms.] Orozco denied that Decedent was an owner of Filser.
>
> Serna, Sr. provided the following testimony. Filser has been in the construction business for ten years. Filser is not an incorporated company. . . . At the time of Decedent's accident, Filser performed work for Aries removing temporary buildings, which were in camps to provide oilfield services. When the accident occurred, Decedent was removing trailers from the jobsite. However, Serna, Sr. was not present at the jobsite at that time. Decedent and his colleagues were supervising the job for Filser.
>
> Serna, Sr. denied that Decedent was his business partner or his employee. Rather, according to Serna, Sr., Decedent worked for Filser as a subcontractor. Serna, Sr. denied that Decedent made any investments in Filser, ever lost money if Filser lost money, or ever risked his own money for Filser's benefit. Decedent did not pay for tools for Filser. Filser provided tools to Decedent.
>
> Serna, Sr. does not read or speak English, and due to the language barrier, Decedent was the point of contact for Aries. Decedent wrote proposals to contractors only with Serna, Sr.'s authorization. Decedent was a "mediator" to obtain insurance for Filser. Decedent wrote invoices for Filser. Decedent arranged payments using a company card. For each of these tasks, Serna, Sr. would instruct Decedent on how to proceed, and Decedent would follow Serna, Sr.'s directions.
>
> Serna, Sr. instructed Decedent where to report to work from day to day. Decedent was paid per day worked. Serna, Sr. initially testified that all checks payable by Filser to Decedent corresponded to work Decedent performed. However, Serna, Sr. also admitted to paying Decedent on occasions when Filser did not have work; although he stated that such payments were not made frequently. Serna, Sr. did not later deduct these additional amounts from actual earnings corresponding to jobs. According to Serna, Sr., he would make payable certain checks to [Ms.] Orozco if Decedent was out of town and [Ms.] Orozco needed money. Serna, Sr. explained that he issued separate checks to both [Ms.] Orozco and Decedent on the same day if Serna, Sr. did not recall the amount of the first check he provided. Serna, Sr. admitted to underreporting Decedent's income when providing a form 1099 for the 2013 tax return in order to help [Ms.] Orozco. He also admitted that he would lie in order to help [Ms.] Orozco.

Orozco I, 16-0187, pp. 2-5, 202 So.3d at 1021-22.

[5] In *Orozco I*, we summarized the OWC's initial judgment, which was rendered on December 4, 2015, as follows:

In *Orozco I*, we further found that the OWC erred, as a matter of law, in failing to determine whether the statutory presumption of employment under La. R.S. 23:1044 was rebutted. We observed that "[h]aving failed to determine under the correct standard of law whether Decedent was an employee, the OWC did not properly reach the issues of whether Decedent was an independent contractor performing manual labor, borrowed employee, or statutory employee or any other employment status that would entitle the Claimants to workers' compensation benefits, if any." *Id*., 16-0187 at pp. 12-13, 202 So.3d at 1026. We remanded for a new trial to determine two issues: (i) Serna Jr.'s employment status—employee, independent contractor performing manual labor, borrowed employee, or statutory employee—as to both Filser and Aries; and (ii) whether the Claimants were entitled to benefits as a result of the particular circumstances of Serna Jr.'s work. *Id.*, 16-0187 at p. 15, 202 So.3d at 1028.[6]

On remand, the OWC, over the Claimants' objection, conducted an "arguments-only" new trial. Following the hearing, the OWC rendered judgment

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> (1) The Claimants were unable to prove an employee-employer relationship with Filser and thus unable to prove that Aries was the statutory employer of Decedent;
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> (2) Decedent and Serna, Sr. were partners of Filser;
>
> (3) Orozco was unable to prove her entitlement to death benefits as she and Decedent were never married;
>
> (4) Aggie was the child of Decedent; and
>
> (5) judgment was rendered in favor of Aries and against Claimants.

16-0187 at p. 5, 202 So.3d at 1022.

[6] In remanding, we acknowledged the concerns regarding the credibility of the two witnesses who testified at trial; we observed that "credibility of witnesses was at issue in this matter. [Ms.] Orozco testified at trial to making false representations on tax returns. Serna, Sr. admitted under oath that he would lie to help Orozco and did, in fact, assist her in underreporting 2013 income on a form 1099." *Orozco I*, 16-0187 at p. 14, 202 So.3d at 1027.

finding that Serna Jr. was an independent contractor and that the manual labor exception did not apply.

On the Claimant's second appeal, this court held that the OWC's second judgment made findings of fact with respect to Serna Jr.'s status, yet failed to "spell out in lucid, unmistakable language" what relief was granted—a requirement for proper decretal language. *Orozco II*, 17-0656 at pp. 2-3), ___ So.3d at ___. Given the lack of proper decretal language, we remanded this case for a second time.

On the second remand, the OWC issued an amended judgment (the third judgment), making the same factual findings as to Serna Jr.'s status as an independent contractor and adding the following decretal language:

> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that judgment is hereby rendered against Claimants and in favor of defendants/alleged employers, Aries Building Systems, Inc. and Filiberto Serna, Sr. and Filser Construction. This matter is dismissed with prejudice, each party to bear its own costs.

The Claimants' third appeal to this court followed.

STANDARD OF REVIEW

The manifest error standard of review applies to factual findings in workers' compensation cases. *Gordon v. A-1 St. Bernard Taxi & Delivery*, 17-0048, pp. 4-5 (La. App. 4 Cir. 8/9/17), 226 So.3d 494, 497 (citing *Orozco I*, *supra*). "'When legal error interdicts the fact-finding process in a workers' compensation proceeding, the *de novo*, rather than the manifest error, standard of review applies.'" *Orozco I*, 16-0187 at p. 5, 202 So.3d at 1023 (quoting *MacFarlane v. Schneider Nat'l Bulk Carriers, Inc.*, 07-1386, p. 3 (La. App. 4 Cir. 4/30/08), 984 So.2d 185, 188).

DISCUSSION

As noted at the outset, we frame the issues before us on appeal as two-fold: (i) whether the Defendants rebutted the statutory presumption of employment; and (ii) assuming that the presumption was rebutted, whether the manual labor exception applies.[7]

Presumption of employment

The statutory presumption of employment is codified in La. R.S. 23:1044, which provides that a "person rendering service for another in any trades, businesses or occupations covered by this Chapter is presumed to be an employee." The presumption is rebuttable. *Wilfred v. A. Serv. Cab Co.*, 14-1121, p. 3 (La. App. 4 Cir. 5/27/15), 171 So.3d 1007, 1010. An alleged employer has the burden of proof in rebutting the presumption and establishing that a worker was not working as his employee for workers' compensation purposes. *Id.* "An alleged employer can rebut this presumption by either (i) establishing that the services were not 'pursuant to any trade, business, or occupation (e.g., construction of one's private residence);' or (ii) establishing that "the individual was performing services but was doing so as an independent contractor.'" *Hillman v. Comm-Care, Inc.*, 01-1140, p. 6 (La. 1/15/02), 805 So.2d 1157, 1161 (quoting 1 Denis Paul Juge, LOUISIANA WORKERS' COMPENSATION § 7:6 (2001)).

Here, the OWC found the Defendants rebutted the presumption by establishing that Serna Jr. was performing services as an independent contractor. In its reasons for judgment, the OWC enumerated the following factors that it relied upon in classifying Serna Jr. as an independent contractor:

[7] The Claimants also assign as error the OWC's conducting of an "arguments-only" new trial. We find it unnecessary to reach that issue.

- Serna Jr. was paid a specific price for the overall undertaking of a job;
- There was no evidence to show that Filser had any control or direction over the method by which Serna Jr. worked, only that he was to perform a specific job, removing the trailers;
- Serna Sr. testified that Serna Jr. was not his employee; and
- Serna Jr.'s own tax returns indicated that he was the owner of his own business.

Challenging the OWC's classification, the Claimants contend that the OWC failed to place the burden of proof on the Defendants to rebut the presumption and that it incorrectly determined that Serna Jr. was an independent contractor. Aries counters that the OWC, on remand, performed the analysis that this court instructed it to perform and that, based on the record, it correctly determined that Serna Jr. was an independent contractor.

"'The distinction between employee and independent contractor status is a factual determination to be decided on a case-by-case basis.'" *Tate v. Progressive Sec. Ins. Co*., 08-0950, p. 2 (La. App. 4 Cir. 1/28/09), 4 So.3d 915, 916 (quoting *Martinez v. Rames*, 16-1312, p. 3 (La. App. 4 Cir. 7/12/17), 224 So.3d 467, 470). A review of the relevant evidence in the record supports the OWC's factual determination that Serna Jr. was an independent contractor. Serna Sr. testified that he considered Serna Jr. to be Filser's independent contractor and that he paid him about $150 to $175 per day. Consistent with his testimony, Serna Sr., on Filser's behalf, issued a Form 1099, Miscellaneous Income, to Serna Jr. for the years 2012 and 2013. On his 2012 federal tax returns, Serna Jr. classified himself as the sole proprietor of a construction or contracting business. Serna Sr. had no involvement in the job that Serna Jr. was performing for Aries at the time of the fatal accident. When the accident occurred, Serna Sr. was working on another job in another

state—Odesa, Texas. Based on the record, we cannot conclude the OWC was manifestly erroneous in determining that Serna Jr. was an independent contractor.

The finding that Serna Jr. was an independent contractor, however, does not end the inquiry regarding Serna Jr.'s employment status. As we instructed in *Orozco I*, the issue of whether the statutory exception for an independent contractor performing manual labor also must be addressed.

Manual labor exception

On remand, the OWC found that the Claimants failed to present sufficient evidence to prove the manual labor exception applied. In so finding, the OWC reasoned that "the only testimony provided was the questionable testimony of Serna, Sr. and Orozco."

The starting point in addressing the issue of whether the manual labor exception applies is the language of the statutory provision codifying the exception, La. R.S. 23:1021(7), which provides:

> "Independent contractor" means any person who renders service, other than manual labor, for a specified recompense for a specified result either as a unit or as a whole, under the control of his principal as to results of his work only, and not as to the means by which such result is accomplished, and are expressly excluded from the provisions of this Chapter unless a substantial part of the work time of an independent contractor is spent in manual labor by him in carrying out the terms of the contract, in which case the independent contractor is expressly covered by the provisions of this Chapter. The operation of a truck tractor or truck tractor trailer, including fueling, driving, connecting and disconnecting electrical lines and air hoses, hooking and unhooking trailers, and vehicle inspections are not manual labor within the meaning of this Chapter.

The Legislature first enacted the manual labor exception in 1948 for the obvious purpose of preventing "abuses by employers who attempted to cast employees as independent contractors to avoid compensation responsibility." H. Alston Johnson, III, LOUISIANA WORKERS' COMPENSATION LAW AND

PRACTICE, 13 La. Civ. Law Treatise, § 76 (5th ed.) ("*JOHNSON*"); *see also Lushute v. Diesi*, 354 So.2d 179, 182 (La. 1977). "The purpose of creating the manual labor exception . . . was due to the confusion and difficulty in determining whether one was an employee or independent contractor and [the exception] was enacted so that all manual laborers would get coverage whether they were held to be an employee or an independent contractor." *Riles v. Truitt Jones Const*., 94-1224, p. 3 (La. 1/17/95), 648 So.2d 1296, 1301-02 (Kimball, J., dissenting). "'Thus, it is the substance of the relationship and not the label used which determines whether an independent contractor recovers workers' compensation benefits.'" *Steinfelds v. Villarubia*, 10-0975, p. 9 (La. App. 4 Cir. 12/15/10), 53 So.3d 1275, 1281 (quoting *Fleniken v. Entergy Corp*., 00-1824, p. 21 (La. App. 1 Cir. 2/16/01), 780 So.2d 1175, 1190).

Construing the manual labor exception, the jurisprudence has required the claimant seeking to invoke the exception to establish the following four factors:

(i) The existence of an independent contractor relationship;

(ii) The performance of manual labor in carrying out the contract;

(iii) The independent contractor spent a substantial portion of the work time performing manual labor; and

(iv) The work was part of the principal's trade, business, or occupation.

See Lushute, 354 So.2d at 182; *Riles v. Truitt Jones Constr.*, 94-1224, p. 4 (La. 1/17/95), 648 So.2d 1296, 1298; *Martinez v. Jaroslav Rames/World of Taste, LLC*, 17-0977, pp. 2-3 (La. App. 4 Cir. 5/9/18), 245 So.3d 78, 80.

Here, the first and the fourth elements require no further analysis. The OWC found, and we affirm, that Serna Jr. was an independent contractor; and it is not disputed that the work Serna Jr. was performing was part of Filser's trade,

business, or occupation. The second and third factors, however, require further analysis.

The terms "manual labor" and "substantial part" are not defined in La. R.S. 23:1021(7).[8] The first judicial construction of these two phrases was by former Justice (then Judge) Tate in *Welch v. Newport Indus., Inc*., 86 So.2d 704, 707 (La. App. 1st Cir. 1956). Because the definitions of these terms set forth in *Welch* have been cited and applied by the jurisprudence, an extensive consideration of the case is warranted here. *See Riles*, 94-1224 at p. 6, 648 So.2d at 1298 (observing that Judge Tate eloquently characterized manual labor and applying the definition); *JOHNSON*, *supra* (observing that "[t]he first judicial effort to define manual labor [by Judge Tate in *Welch*] is probably still the best").

The plaintiff in *Welch* was a contractor who had a sizable operation, including supervising thirty men. The plaintiff was injured "when he with one helper, each using with their own hands the appropriate tools, dug a ditch, cut logs, and shoved with logs and at logs to unbog a stuck tractor." *Welch*, 86 So.2d at 707. Although the plaintiff's primary function was supervising, he assisted in loading and unloading. Arguing against the application of the manual labor exception, the defendant contended that "manual labor" should be construed to mean "not simply use of his hands such as in driving a pickup truck, loading and unloading supplies, in the performance of duties primarily supervisory in nature, but use of his hands to perform strictly non-supervisory duties," and that that "substantial part" should be

[8] The Legislature amended the statute in Acts 2004, No. 188, § 1, to add the last sentence, which provides that "[t]he operation of a truck tractor or truck tractor trailer, including fueling, driving, connecting and disconnecting electrical lines and air hoses, hooking and unhooking trailers, and vehicle inspections are not manual labor within the meaning of this Chapter."

construed to mean "a considerable or large portion, rather than merely some time." *Id.* at 706.

Rejecting the strict construction of the statute urged by the defendant, Judge Tate, writing for the court in *Welch*, found that the plaintiff was entitled to workers' compensation as an independent contractor who spent a substantial part of his work time performing manual labor. In so finding, Judge Tate extensively addressed the meaning of the terms "manual labor" and "substantial part." As to "manual labor," he observed:

> '[S]upervisory duties' and 'manual duties' are not necessarily contradictory terms for purposes of determining compensation coverage. 'Supervisory duties' may include the performance of manual labor so as to entitle the individual employed in the performance thereof to the protection of our Compensation Act. It may technically be 'supervisory' to truck supplies or to aid in loading logs, or to unbog machinery, or maintain machinery in operation, all with the use of one's own hands, but the true legal meaning of the term 'manual labor' is to denote work in which the physical element predominates over the mental, see 26 Words and Phrases, Verbo Manual Labor, p. 603. For purposes of determining compensation coverage, the distinguishing feature is whether the workingman participates physically himself, rather than-so to speak-aloofly directs in clean Sunday clothes.

Id. at 707.

As to "substantial part," Judge Tate observed:

> While in some legal senses 'substantial' indeed has the signification of the larger part, such as in 'substantial compliance', legally the words 'substantial part' also are used not as a term of mathematical precision, but also so as to mean the converse of insubstantial or immaterial.
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> As was stated in a federal case interpreting the words 'substantial part' in connection with the interpretation of the Fair Labor Standards Act, 29 U.S.C.A. § 201 *et seq.*, a remedial statute with similar legislative intention and judicial interpretation,
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> 'A substantial part' is not a phrase of mathematical precision. For the purpose under consideration, I think it is satisfied by less than 50 per cent. I do not think that in the context in which it is used by the

> Supreme Court, 'substantial' means the same as when it is used in the phrase, 'substantial performance of a contract.' I construe the language to mean the converse of insubstantial or immaterial. *See, Schainman v. Dean*, 9 Cir., 1928, 24 F.2d 475, 476. By such a standard, I find that a substantial part of the plaintiffs' activities was in the production of goods for commerce', *Berry v. 34 Irving Place Corporation, D.C.*, 52 F.Supp. 875, at page 879.

Id. at 706-07.

The jurisprudence, applying the *Welch* standard, has held that the nature of certain jobs places them into the manual labor category. Applying the *Welch* standard, the Louisiana Supreme Court in *Riles, supra,* provided the following list of jobs exemplifying manual labor: car transporter, car mechanic, skilled carpenter, skilled welder, siding mechanic, house painter, and some supervisors. *Martinez v. Rames*, 16-1312, p. 5 (La. App. 4 Cir. 7/12/17), 224 So.3d 467, 471 (citing *Riles*, 94-1224 at pp. 8-9, 648 So.2d at 1299-300). In contrast, the Supreme Court in *Hillman, supra,* found that a beautician, by nature, is not a job exemplifying manual labor. *Hillman*, 01-1140 at p. 6, n. 1, 805 So.2d at 1161. A construction worker, by nature, is a job exemplifying manual labor. *See Thomas v. Holland*, 345 So.2d 1000, 1002 (La. App. 2d Cir. 1977) (observing that "even if [the plaintiff] was an independent contractor, his construction work involved a substantial amount of manual labor, which would bring him within the scope of the Act"); *see also Martinez*, 17-0977 at p. 4, 245 So.3d at 80 (observing that "Mr. Martinez did carpentry and maintenance work for Mr. Rames. Mr. Martinez's work was clearly more physical than mental which meets the criteria for manual labor.")

The Claimants contend that Serna Jr. was unquestionably performing manual labor that was a substantial part of his job "when he was crushed to death." Alternatively, the Claimants contend that "[i]f there was some question as to

whether Serna's claim meets the "manual labor exception, surely the best course would be to take further evidence on the issue."

Aries counters that the record is insufficient to determine if the manual labor that Serna Jr. performed was substantial. According to Aries, no evidence was introduced at trial to show that a substantial part of Serna Jr.'s work time was spent in manual labor carrying out the terms of the contract. *See Smith v. Prime, Inc*., 09-269, pp. 6-7 (La. App. 3 Cir. 10/7/09), 20 So.3d 1184, 1189 (observing that it was "the claimant's burden of proving he would be able to demonstrate that, although he was an independent contractor, 'a substantial part of [his] work time [was] spent in manual labor by him in carrying out the terms of the contract'"). Aries submits that the sole evidence as to the specific work that was being performed by Serna Jr. was that Filser was removing trailers and that Serna Jr. worked with his hands. According to Aries, this evidence was insufficient to satisfy the Claimants' burden of showing that the requirements for invoking the manual labor exception were met. We disagree. *See Rashall v. Fallin & Savage Timber Co*., 127 So.2d 238, 241 (La. App. 3d Cir. 1961) (rejecting argument that the record was insufficient).[9]

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[9] In *Rashall*, the plaintiff assisted his two employees in cutting and hauling wood. The defendant contended that the record was devoid of testimony to establish the amount of manual labor the plaintiff actually performed. Finding this argument lacked merit, the court in *Rashall* reasoned as follows:

> A reading of the record as a whole shows clearly that plaintiff was a very small operator who owned only one truck which he purchased for $500, employed only two helpers, one of whom was his brother, who worked at a wage of $15 per week, that plaintiff . . . of necessity worked with his helpers cutting and hauling wood. Plaintiff was actually injured while loading wood onto his truck and then approximately two weeks after his initial injury he tried to return to work but was unable to perform this type of heavy manual labor so he stopped and has not worked since. On this issue the facts of the instant case are much stronger in plaintiff's favor than the facts in the *Welch* case. . . . Clearly a substantial part of the work time of Rashall was spent in manual labor in carrying out the terms of his contract with the defendant.

Id. at 241.

Here, Serna Jr. was performing manual labor—construction work (removing trailers). His work was "clearly more physical than mental." *Martinez, supra.* Because virtually all work includes some degree of manual labor, the real question presented is whether a substantial part of Serna Jr.'s work was manual labor. "Whether a substantial part of one's job involves manual labor is a factual determination addressed on a case-by-case basis." *Smith v. Moreau*, 17-0003, p. 9 (La. App. 1 Cir. 6/2/17), 222 So.3d 761, 768.

The record reflects that at the time of the accident Serna Jr. was working for Filser, his father's construction company. In *Orozco I*, we observed that Serna Jr. was actively involved in Filser's business operations; however, we found that his involvement in the business was insufficient to qualify him as a partner in Filser. The business-related tasks that Serna Jr. performed for his father, as the Claimants acknowledge in their brief to this court, included [i] negotiating contracts; [ii] making purchases with the company credit card; and [iii] procuring insurance for the company. Those tasks were necessary, as Serna Sr. explained, due to Serna Sr.'s inability to read or speak the English language. Although Serna Jr. performed those business-related tasks, his performance of those tasks did not render the manual labor tasks he also performed insubstantial.

The record further reflects that neither Filser nor Serna Jr. was a large-scale operation. Filser was a "mom-and-pop," unincorporated business. According to Serna Sr., Filser had about eight or ten workers besides his son. Likewise, Serna Jr. was a small-scale operation. According to his 2012 tax return, Serna Jr. was a sole proprietorship engaged in the construction business with no employees. On his return, Serna Jr. listed a total of $11,013

in expenses related to his business; he claimed no expense for wages. Serna Jr. was "not an independent contractor on a large scale who obtained a contract and then employed others to actually perform the physical work." *Sam v. Deville Gin, Inc*., 143 So.2d 838, 841 (La. App. 3d Cir. 1962). Serna Jr. thus falls within the category of the working independent contractor that the Legislature intended to protect by enacting La. R.S. 23:1021(7).

Finally, contrary to Aries contention, Serna Sr.'s testimony that Serna Jr. was removing trailers for Aries and that he worked "with his hands" must be viewed in context. Serna Jr., while working with his hands performing construction work, as the Claimants emphasize, was crushed to death on the job. Accordingly, the OWC's finding that the Claimants failed to present sufficient evidence to prove that the manual labor exception applied is manifestly erroneous. In sum, Serta Jr. was an independent contractor performing manual labor under La. R.S. 23:1021(7).

DECREE

For the forgoing reasons, the judgment of the Office of Workers' Compensation Judge is reversed and this matter is remanded for further proceedings.

REVERSED AND REMANDED