BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G905793

EMERY HUMPHRIES, Employee	CLAIMANT
FNA GROUP, LLC, Employer	RESPONDENT
AMTRUST NORTH AMERICA, Carrier	RESPONDENT

OPINION FILED AUGUST 18, 2023

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

Claimant represented by JASON M. HATFIELD, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 23, 2023, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 14, 2022, and a Pre-hearing Order was filed on November 15, 2022. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction to determine whether Respondent No. 2, FNA Group, LLC, was a dual employer of Claimant.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether or not FNA Group, LLC was a dual employer of the claimant and therefore protected under Exclusive Remedy provisions of Arkansas Code Annotated §11-9-105.

Claimant’s contentions are:

"On or about August 19, 2019, Claimant EMERY R. HUMPHRIES, was an employee with LABOR SOLUTIONS. Claimant was hired and paid by LABOR SOLUTIONS. Claimant was injured while working at the FNA GROUP, INC., facility.

An express contract exists between LABOR SOLUTIONS and FNA GROUP INC., wherein Claimant is a third-party beneficiary. The contract clearly and unambiguously states Claimant is not to be considered an employee of FNA GROUP, INC., for any purpose and specifically states that LABOR SOLUTIONS is an independent contractor.

FNA HOLDING CO alleges they are a dual employer of Claimant, despite clear unambiguous contract language FNA Group, INC., drafted which states: **No Personnel of Labor Solutions shall be deemed an employee of Customer for any purpose related to the Agreement, including, without limitations, under any compensation or benefit plan of the Customer**.

The three essential elements of dual employment relied on under the Arkansas Workers' Compensation rules are:
When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if:
(a) The employee has made a contract for hire, express or implied, with the special employer;
(b) The work being done is essentially that of the special employer; and
(c) The special employer has the right to control the details of the work.

It is clear that the express contract in this case unambiguously states Claimant is never to be considered an employee of FNA GROUP, INC., for any purpose. The inquiry stops there. The parol evidence rule prevents introduction of additional evidence in attempt to modify or amend the contract.

Respondent FNA GROUP, INC., cannot escape the express contract which clearly and unambiguously establishes that Claimant EMERY R. HUMPHRIES is not an employee of Respondent FNA GROUP, INC., but is instead an independent contractor."

Respondents' contentions are:

> "FNA entered into a contract for Respondent No. 1, Labor Solutions of Arkansas, LLC, to provide employees to work in FNA's plant. The Claimant came to work for FNA under said contract. FNA was a special employer in this matter.
>
> First, there is an implied contract of hire since the Claimant was allowed to come to work at the FNA plant under this contract. Secondly, the work being performed was essentially that of the special employer, FNA. Third, FNA had the right to control the details of the work. Therefore, FNA is a special employer and is afforded protection under the provisions of AR. Code Ann. §11-9-105."

The claimant in this matter is a 24-year-old male who suffered a compensable amputation of the lower left extremity on August 19, 2019, while operating a cardboard crusher. The claimant was employed by Labor Solutions, a temporary employment service, at that time working inside of an FNA Group, the respondent, production facility. The question before the Commission is to determine the employment status of the claimant as it relates to FNA Group. On September 13, 2022, Judge Xollie Duncan in the Circuit Court of Benton County, Arkansas, Civil Division, signed an order found at Joint Exhibit 1, referring this matter to the Arkansas Workers' Compensation Commission for determination of the claimant's employment status with FNA Group.

The sole issue before the Commission is whether the claimant was a dual employee of Labor Solutions and FNA Group on August 19, 2019, when he sustained an amputation of the left lower extremity between the knee and ankle. The claimant contends he was not a dual employee in that he was an employee of Labor Solutions, but not an employee of FNA Group. The respondent contends that the claimant was both an employee of Labor Solutions and FNA Group and thus a dual employee which would provide FNA Group Exclusive Remedy protection from tort liability under the Arkansas Workers' Compensation Act.

In *Randolph v. Staffmark*, 2015 Ark. App. 135, the Arkansas Court of Appeals considers the issue of dual employment and uses the Supreme Court's decision in *Daniels v. Riley's Health and Fitness Centers*, 310 Ark. 756 (1992) to do so. The Court of Appeals stated, "…where it held that when a general employer lends an employee to the special employer, the special employer becomes liable for workers' compensation only if three facts are satisfied: (1) the employee has made a contract for 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."

The first of three facts that must be satisfied in *Daniels, supra,* is whether "the employee made a contract for hire, express or implied, with the special employer." Here, the claimant being the employee and FNA Group, the special employer. It is undisputed that the claimant was hired by Labor Solutions as an employee in July of 2019 and began work in the FNA Group facility that same month. Documentation of his application to be employed by Labor Solutions and work in an FNA Group facility is found at Claimant's Exhibit 2, pages 8-20, including a document entitled "Mini Facts" found specifically at Claimant's Exhibit 2, pages 16-20, which, among other requirements, assigns the claimant to work for Labor Solutions at an FNA Group facility. There is, however, no express contract for hire between the claimant and FNA Group as there appears to be no dispute as to the existence of an express contract. Therefore, in order to meet the first "fact" that must be proven to establish dual employment of the claimant between Labor Solutions and FNA Group, an implied contract for hire must exist between FNA Group and the claimant.

Both the claimant and respondent filed post hearing briefs in this matter. Both parties put forth legal precedent and argument about Arkansas law regarding implied contract. The respondent, in part, stated:

> The test on implied contract of hire is "control of the employee." In fact, there have been numerous cases on implied contracts of hire in special employer cases. In the case of Estate of Bogar v. Welspun Pipes, Inc., 2014 Ark. App. 536, 444 S.W.3d 405, Welspun was determined to be the special employer by the Arkansas Workers' Compensation Commission. In determining the implied contract, the court said you look at the totality of circumstances surrounding the relationship. They noted as follows:
>
> > The undisputed testimony in this case indicates that Elite Services recruits employees for Welspun. However, once the employees go to work at the Welspun facility, Welspun dictates the hours they work, sets their rate of pay, can discipline the individuals and can terminate the individuals. Once Elite Services hires and supplies an employee to Welspun, Elite Services' primary function is to process payroll…. This examiner can think of no greater indications of an implied employment contract than the ability to determine a worker's weekly hours, his rate of pay, his discipline, and his termination, *combined with* the right to control the work being performed.
>
> Est. of Bogar v. Welspun Pipes, Inc., 2014 Ark. App. 536, 3, 444 S.W.3d 405, 407 (2014) (emphasis in original).
>
> The Court went on to say that it is important to look at the relationship between general and special employer. Randolph v. Staffmark, 2015 Ark. App. 135, 456 S.W.3d 389.

The claimant, in part, stated:

> The only remaining argument for FNA is that there was an *implied* contract of employment between FNA and Humphries. Arkansas law on implied contracts teaches:
>
> > There are two classes of implied contracts, i.e., those properly called implied contracts, where the

> contract is inferred from the acts of the parties, and those which are more properly called quasi-contracts or constructive contracts, where the law implies an obligation. *Caldwell v. Missouri State Life Insurance Co*., 148 Ark. 474, 230 S.W. 566. The first type of implied contract is sometimes called a contract implied in fact and it derives from the "presumed" intention of the parties as indicated by their conduct. *Martin v. Campanaro*, 156 F.2d 127 (2d Cir., 1946). See also, *Gray v. Kirkland*, 550 S.W.2d 410 (Tex.Civ.App., 1977); *Johnson v. Whitman*, supra; *United States v. O. Frank Heinz Construction Co*., 300 F.Supp. 396 (S.D.III., 1969). In determining whether a "tacit" but actual contract exists, the prior course of dealing between the parties is to be considered. *Jones v. Donovan*, 255 Ark. 474, 426 S.W.2d 390. An implied contract is proven by circumstances showing the parties intended to contract or by circumstances showing the general course of dealing between the parties.

Both parties provided relevant, legal precedent regarding implied contract. The respondent points out the need to consider the totality of the circumstances surrounding the relationship while also pointing out the importance of looking at the relationship between the general and special employer. Here, the general employer being Labor Solutions and the special employer being FNA Group.

FNA Group and Labor Solutions entered into an express contract on July 2, 2019. That agreement was titled "Agreement for Temporary Personnel." It was signed by the Vice President of Operations for Labor Solutions and Senior Vice President of FNA Group, Thomas Moffett, who testified at the hearing in this matter. That document can be found at Claimant's Exhibit 2, pages 1-4. That document references an Exhibit A titled "Statement of Work" which is found at Claimant's Exhibit 2, pages 5-6. It is undisputed that this is the express contract that was in effect on August 19, 2019, when the claimant's compensable lower left extremity amputation

occurred, between Labor Solutions, the general employer, and FNA Group, the special employer. It should be noted that FNA Group is termed "customer" in this agreement.

In review of the "Agreement for Temporary Personnel," I find section 5 titled "Personnel," which states as follows:

> 5. ***Personnel***. Labor Solutions, at its cost, shall provide personnel (the "Personnel") to perform the Services. Labor Solutions shall be solely responsible for the full payment of all compensation due the Personnel, including, without limitation, all wages, benefits, withholdings, payroll taxes and contributions. **No Personnel of Labor Solutions shall be deemed an employee of Customer for any purpose relating to this Agreement, including, without limitation, under any compensation of benefit plan of Customer**. (Emphasis added)

The existence of an implied contract between a claimant and a special employer relies heavily on the amount of control the special employer has over the general employer's employee. Testimony and evidence from both parties varies in an effort to show a high or low level of control over the claimant. However, in this particular case, I do not believe the level of control over the claimant is the primary issue. The special employer, FNA Group, contracted away their ability to engage in an express or implied contract for hire with the claimant on July 2, 2019, when they entered into the "Agreement for Temporary Personnel" as it states: "No Personnel of Labor Solutions shall be deemed an employee of Customer for any purpose relating to this Agreement, including, without limitation, under any compensation of benefit plan of Customer." While that contract is not between the claimant and FNA Group, it is between the claimant's general employer, Labor Solutions, and FNA Group and that agreement affected the claimant when he became an employee of Labor Solutions during the "Agreement for Temporary Personnel" contract period. Even if the claimant and FNA Group had wanted to enter into an express or implied contract for hire during that period they would contractually have not

been able to do so under the "Agreement for Temporary Personnel" with Labor Solutions. It is contractually impossible for a Labor Solutions employee, here the claimant, to be "deemed an employee of customer (FNA Group) for any purpose relating to this agreement, including, without limitation, under any compensation or benefit plan of customer." Thus, it is impossible for the first of the three "facts" that must be satisfied to prove dual employment and provide FNA Group protection under the Exclusive Remedy of Workers' Compensation Act to exist. That "fact" states, "The employee has made a contract for hire, express or implied, with the special employer."

Thomas Moffett, the Senior Vice President of FNA Group, was called as a witness by the respondent in this matter. It was Mr. Moffett who signed the "Agreement for Temporary Personnel" for FNA Group. On cross-examination, Mr. Moffett was asked about the agreement and the status of the claimant under different scenarios as follows:

> Q I asked you some questions and I don't think you knew the answer, but if Emery were to say, hey, I am an employee of FNA and I want to make a sexual harassment claim against FNA, would you guys accept him as your employee?
>
> A We would accept and investigate the allegation, but we would do it jointly with Labor Solutions.
>
> Q You would reserve your right to allege he is not our employee, he is an independent contractor; right?
>
> A We would not necessarily technically say that. We would just say, hey, look, there is an allegation and our two HR departments for both companies would interact. I don't think we would ever think for a moment that we're making a declaration in terms of their employment status, but rather investigate the claim.
>
> Q Other than the declaration you made in the contract of what the employment status is?
>
> A That is fair, yes.

Q Okay. And I could ask you about the whole slew of things: Alleged discrimination, FMLA violations, EEOC, ADA, ERISA, all of those you would reserve your right to say he can't make that claim against us because he is not our employee; correct?

A That is correct.

Q Based on the contract you signed?

A Yes, sir.

Q And you agree that FNA did not provide workers' comp for Emery Humphries?

A That is correct.

Q And FNA did not even list Emery Humphries as an employee when you were applying for workers' comp insurance?

A I was not involved in the intricacies with that. I don't know what was involved with that.

Q But during your monthly trips to Arkansas, if they were to ask you, would you say, no, do not list the Labor Solutions' 140 employees as people that we have to pay workers' comp premiums on?

A In that example, correct, yes, sir.

Q You guys didn't offer any type of health benefits or retirement benefits, anything like that?

A Not that I am aware of.

Q You did not pay his Social Security or Medicare taxes?

A No, sir.

Q You did not withhold any taxes?

A No, sir.

> Q Your contract that you signed provides no evidence of what you negotiated with Labor Solutions in terms of pay; is that correct?
>
> A In terms of the wages?
>
> Q Correct.
>
> A No.

It is clear that FNA Group had no desire or belief that the claimant would be an employee of FNA Group until such time as his employment might grant civil liability protection. Here, FNA Group wants to have its cake and eat it too.

The parties in this matter have apparently done voluminous research but have not provided the Commission with a case to consider where a contract between a general employer and a special employer forbids the general employer's employee, here the claimant, from being considered an employee of the special employer "for any purpose." I, too, have failed to find such a case on which to rely. However, in considering the relationship between the general employer and the special employer, along with the totality of the circumstances, I find that FNA Group has contracted away its ability to meet the first of the three "facts" that must be satisfied in *Randolph v. Staffmark*, 2015 Ark. App. 135, which relied upon the Supreme Court's decision in *Daniels v. Riley's Health and Fitness Centers*, 310 Ark. 756 (1992). The respondent, FNA Group, has failed to prove that the claimant was a dual employee of the general employer, Labor Solutions, and the respondent, FNA Group.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 14, 2022, and contained in a Pre-hearing Order filed November 15, 2022, are hereby accepted as fact.

2. FNA Group, LLC has failed to prove by a preponderance of the evidence that it was a dual employer of the claimant and entitled to protection under the Exclusive Remedy provisions of Arkansas Code Annotated §11-9-105.

ORDER

Pursuant to the above findings and conclusions, I find that the respondent has failed to prove by a preponderance of the evidence that it was a dual employer of the claimant and is, therefore, not entitled to protection under the Exclusive Remedy provisions of Arkansas Code Annotated §11-9-105.

If they have not already done so, the respondents are directed to pay the court reporter, Veronica Lane, fees and expenses within thirty (30) days of receipt of the invoice.

IT IS SO ORDERED.

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HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE