BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G905793

EMERY HUMPHRIES, EMPLOYEE	CLAIMANT
FNA GROUP, LLC, EMPLOYER	RESPONDENT
AMTRUST NORTH AMERICA., CARRIER/TPA	RESPONDENT

OPINION FILED APRIL 3, 2024

Upon review before the Full Commission, Little Rock, Pulaski County, Arkansas.

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

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents appeal the Opinion filed August 18, 2023, by the administrative law judge ("ALJ") finding that the respondent employer, 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.

In this State, an employer is granted protection from civil liability by Arkansas Code Annotated § 11-9-105(a), which states in part that:

> (a) The rights and remedies granted to an employee subject to the provisions of this

> chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone otherwise entitled to recover damages from the employer[.]

The fundamental question as to special employment is whether the relationship of employer and employee existed at the time of the injury. *Randolph v. Staffmark*, 2015 Ark. App. 135, 456 S.W.3d 389 (2015).

> What is at issue before us is the application of the dual-employment doctrine. This doctrine was explained by our supreme court in *Daniels v. Riley's Health & Fitness Centers*, 310 Ark. 756, 840 S.W.2d 177 (1992), where it held that when a general employer lends an employee to a "special employer," the special employer becomes liable for workers' compensation only if three factors 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. *Id*.

It is well settled that although a worker may be the servant of one employer for certain acts and the servant of another for other acts, "[t]he crucial question is which employer had the right to control the particular act giving rise to the injury." *Charles v. Lincoln Construction*, 235 Ark. 470, 361 S.W.2d 1 (1962).

Our courts have consistently held that staffing agencies and temporary agencies such as Labor Solutions are part of today's

marketplace and staffing agency-contractor relationships satisfy the dual-employment doctrine.

Where there is no express contract between the parties, we must determine whether there was an implied contract between the claimant and FNA. The existence of an implied contract for hire is a fact question to be determined on the totality of the circumstances surrounding the relationship of the claimant and FNA. *Randolph v. Staffmark*, 2015 Ark. App. 135, 456 S.W.3d 389 (2015).

An implied contract is proven by showing the parties intended to contract by circumstances showing the general course of dealing between the parties. *K.C. Props. of N.W. Ark., Inc. v. Lowell Inv., LLC*, 373 Ark. 14, 280 S.W.3d 1 (2008). The primary test is which party controls the work being done. *Estate of Bogar v. Welspun Pipes, Inc*., 2014 Ark. App. 536, 444 S.W.3d 405 (2014).

There are “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.” *Id*. The question of who writes an employee’s paycheck is one of mechanics and not of substance and does not control the analysis. *Durham V. Prime Indus. Recruiters, Inc*., 2014 Ark. App. 494, 442 S.W.3d 881 (2014).

While the question of whether an employee is paid for his services is a factor in determining the existence of an implied contract, the courts are not concerned with whether a contractor pays an employee directly or through reimbursements for a temporary service's payments for that work, but rather whether there is work done for which an employee is paid. *See Bogar*, 2014 Ark. App. 536, 444 S.W.3d 405; *Sharp County Sheriff's Office v. Ozark Acres Improvement District*, 349 Ark. 20, 75 S.W.3d 690 (2002).

The Court ruled in *Gann v. CK Asphalt*, LLC, 2023 Ark. App. 218, 666 S.W.3d 116 (2023) that even where business operations are "combined," or share the same ownership and compensate each other for the use of tools and materials, there must be evidence that the special employer actually compensated a worker to create a contract. In finding there was no contract for hire between the claimant and BLK since BLK did not pay Mr. Gann, the Court stated:

> Absent the remuneration required by *Sharp County*, there can be no implied contract between Gann and BLK. The test in *Daniels v. Riley's Health & Fitness Centers*, 310 Ark. 756, 840 S.W.2d 177 (1992), is a three-part conjunctive test. *Id*.

In analyzing the issue of dual employment, our courts have looked to other states for clarity and relying at times on a Minnesota decision that states:

> Since both employers may each have some control there is nothing logically inconsistent . . . in finding that a given worker is the servant of one employer for

> certain acts . . . The crucial question is which employer had the right to control the particular act giving rise to the injury.

Daniels v. Riley's Health & Fitness Ctrs., 310 Ark. 756, 840 S.W.2d 177 (1992) (citing *Nepstad v. Lambert*, 235 Minn. 1, 50 N.W.2d 614 (1951)).

> Since the question of liability is always raised because of some specific act done the important question is not whether or not he remains the servant of the general employer as to matters generally but whether or not as to the act in question, he is acting in the business of and under the direction of one or the other.

Charles v. Lincoln Constr. Co., 235 Ark. 470, 361 S.W.2d 1 (1962) (citing *Nepstad*, 235 Minn. 1, 50 N.W.2d 614).

The dual-employment doctrine does not require the contract between the parties to be long term or permanent, whether express or implied. Although the Commission may consider the length of time an employee works for a special employer in its analysis, it is not determinative. *Ward v. Commerce Construction Co.*, 2024 Ark. App. 150 (2024). “The crucial question is which employer had the right to control the particular act giving rise to the injury.” *Id*.

In the present case, FNA is in the business of building gasoline powered pressure washers and generators. (Hrng. Tr, P. 50). In August of 2019, FNA was contracted with Labor Solutions, a temporary staffing agency, to provide employees for work on their production lines. (Hrng. Tr., Pp. 50, 52). Labor Solutions maintained an office in the FNA facility with its

own entrance and facilities. (Hrng. Tr, P. 52). Although employees were recruited by Labor Solutions, FNA determined working hours, breaks, pay rates, dress code, and who would be line leaders. (Hrng. Tr., Pp. 52-53, 55). FNA has the ultimate say in whether a worker is entitled to a pay raise. (Hrng. Tr, P. 53). FNA's rights extended to the ability to assign worker tasks and FNA maintained the right to fire employees without agreement by Labor Solutions. (Hrng. Tr, Pp. 53-55, 80). FNA provided any necessary safety equipment such as grinding shields and welding hoods. (Hrng. Tr, P. 56). In short, FNA had total control over all aspects of the work done in their facility, including the quality of the work and how the work was performed. (Hrng. Tr, P. 59). Labor Solutions had no control or supervision over the line work or how FNA products were made. (Hrng. Tr, P. 82).

Juan Dominguez, who worked for Labor Solutions out of the FNA facility in 2019, testified that FNA was responsible for almost every aspect of the job other than getting an employee through the door. Id. "FNA assumes control of the employee and designates the assignment and is responsible for the daily oversight, training, management, and productivity of that individual associate." (Hrng. Tr, P. 108). During orientation, Labor Solutions makes it clear that an associate works for FNA. (Hrng. Tr., P. 78).

While Labor Solutions may have controlled the administrative aspects of the claimant's work with FNA, such as issuing payroll and handling insurance, FNA handled all day-to-day assignments. (Hrng. Tr.,

Pp. 109-110). And although Labor Solutions delivered the claimant's pay, FNA itself paid Labor Solutions an employee's hourly rate with an additional twenty-five percent (25%) surcharge for "all of the other day-to-day business operations." (Hrng. Tr, P. 77). On the date of the claimant's injury, Labor Solutions had no role in assigning the claimant to the baler. (Hrng. Tr, P. 57).

In his hearing testimony, FNA Senior Vice-President Thomas Moffett had the following exchange regarding the agreement between FNA and Labor Solutions:

Q: (by Mr. Frye) Who sets the wage rates?

A: (by Mr. Moffett) FNA does.

Q: Okay. What can Labor Solutions do about the hourly rate that is paid to, say, Mr. Humphries?

A: Nothing.

Q: So under this, you have already mentioned about the duties of Labor Solutions. What does FNA do?

A: FNA assumes control of the employee and designates the assignment and is responsible for the daily oversight, training, management, and productivity of that individual associate.

Q: So you all control the means and methods of the work?

A: Yes, sir.

Q: So, you heard Rick say that you all set the pay rate?

A: Correct, that is correct.

Q: The breaks, the overtime?

A: That is correct.

Q: Determine the work assignments and the supervisors?

A: That is correct.

Q: All right. Just a side note, Mr. Hatfield asked Juan [Dominguez] about investigation after Mr. Humphries was hurt. Did FNA send anybody down to do an investigation?

A: We did.

Q: Who was sent down to do the investigation?

A: We sent immediately our CFO, Rocky Scalzo, and our corporate HR manager, Samantha Carias, from the Pleasant Prairie, Wisconsin office.

Q: Okay. With the way it was working, who was responsible for controlling and assigning and putting people in the work assignments?

A: The local FNA management.

Q: You heard Mr. Hickson say that if he decided he wanted to terminate somebody that he could. Is that how it worked?

A: Yes, he could.

Q: Okay. So Labor Solutions would do the orientation and get the people in the door; correct?

A: That is correct.

Q: And then it was left up to FNA to move the employees and control the job?

A: That is correct.

Q: Okay. Why was it set up like this?

A: Because we are responsible for the throughput and the quality of product that goes out of that manufacturing facility.

Q: Okay. And is this the way that this was done between FNA and Labor Solutions in 2019?

A: Yes, sir.

Q: Okay. Was there any deviation from that?

A: Not that I'm aware of.

Q: Okay. Well, as senior vice-president, would you be aware of that?

A: Yes.

Q: Okay. So, again, the way this agreement was is they hired the people and you managed the labor?

A: That is correct.

Q: Labor Solutions did the recruiting and did management of the process of the administrative tasks of payroll and wages; correct?

A: Correct.

Q: And outside of that, there was a handoff that was made to the local FNA associates and their managers?

A: That is correct. (Hrng. Tr., Pp. 107-110).

Mr. Moffett went on to explain:

> So from an operationally-speaking position, the Labor Solutions Group was responsible for the recruiting and the staffing, if you may, of temp labor. [FNA] then at that point in time took over. And when I say took over, the FNA local management would then assume responsibility for the assignments and the training and the development and the promotion and the reassignments of those such employees. And we operated not only in 2019, but for somewhere around I believe 16 years under that premise and both owners of the business understood exactly what the roles were for each business.

(Hrng. Tr., P. 111).

FNA was a dual employer of the claimant at the time of his injury. Not only did FNA specifically assign the claimant to the baler with no input from Labor Solutions, but FNA controlled every aspect of the claimant's work from when he arrived to what he wore on a day-to-day basis. FNA determined what the claimant would earn and if he was entitled to more pay and reimbursed Labor Solutions for the claimant's pay. The only role Labor Solutions had over the claimant's employment was his initial hiring and administrative duties such as payroll.

While the ALJ focuses on the language of the contract between FNA and Labor Solutions, he disregards the fact that Labor Solutions had no say in any essential aspect of the claimant's work with FNA. The parties were operating under an implied contract at the time of the claimant's injury. Further, the claimant's work for FNA was clearly "essentially that of the special employer," as he was working in the FNA facility under its control at

the time of his injury. And given that FNA was responsible for every aspect of the claimant's work, the claimant was operating under FNA's control on the date of the accident, August 19, 2019.

For these reasons, we find that FNA was a special employer of the claimant at the time of his on-the-job injury and is, therefore, entitled to the exclusive remedy doctrine of our Act. Therefore, the Opinion of the ALJ filed on August 18, 2023 should be and is hereby reversed.

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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MICHAEL R. MAYTON, Commissioner

Commissioner Willhite dissents.

DISSENTING OPINION

The Administrative Law Judge (hereinafter referred to as "ALJ") found that the Claimant failed to prove by a preponderance of the evidence that it was a dual employer of the Claimant and is entitled to protection under the Exclusive Remedy provision of Ark. Code Ann. § 11-9-105. After a thorough review of the record, I would agree with that finding.

The dual-employment doctrine provides that when a general employer lends an employee to a special employer, the special employer becomes liable for workers' 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. *Randolph v. Staffmark*, 2015 Ark. App. 135, 456 S.W.3d; *Daniels v. Riley's Health & Fitness Ctrs.*, 310 Ark. 756, 759, 840 S.W.2d 177, 178 (1992). When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workers' compensation. *Id.* The solution of almost every such case depends on the answer to the basic, fundamental, and bedrock question of whether, as to the special employee, the relationship of employer and employee existed at the time of the injury. *Id.* If the facts show such a relationship, then the existence of a general employer should not change or be allowed to confuse the solution of the problem. *Id.*

An express contract exists between Respondent and Labor Solutions, the temporary staff agency. The express contract specifically states:

> 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).

It appears to be clear from the evidence that the Claimant did not have an express contract with Respondent, but rather Respondent expressly prohibited the Claimant from being recognized as an employee through Labor Solutions. The next question is whether an implied contract of employment could exist between the Claimant and Respondent. This analysis requires a determination of the intent of the parties. *See City of Batesville v. Independence County*, 2023 Ark. App. 401, 678 S.W.3d 35. Since the parties have expressly stated their intent to avoid such a finding, it would seem inappropriate to consider other evidence. I find that where the parties expressly and clearly state their intention to avoid an employment relationship, there can be no implication that a contract of this type exists. As such, Respondent has failed to prove by a preponderance of the evidence that it was a dual employer of the Claimant and therefore entitled

to the Exclusive Remedy protections provided by Ark. Code Ann. § 11-9-105.

Therefore, for the aforementioned reasons, I find that the Claimant was not a dual employee of Respondent and Labor Solutions and therefore Respondent should not be entitled to the Exclusive Remedy protections provided by Ark. Code Ann. § 11-9-105.

For the foregoing reasons, I must dissent.

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M. Scott Willhite, Commissioner