BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H102949**

TERRY MENCL, EMPLOYEE	CLAIMANT
STAFFMARK GROUP, EMPLOYER	RESPONDENT
DAUGHERTY & DAUGHERTY D/B/A 1ST EMPLOYMENT STAFFING	RESPONDENT

OPINION FILED **DECEMBER 12, 2024**

Before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Springdale, Washington County, Arkansas.

Claimant represented by BRIAN G. BROOKS, Attorney, Greenbrier, Arkansas, and CHRISTOPHER HEIL, Attorney, Little Rock, Arkansas.

Respondents represented by STUART P. MILLER and JACOB A. MCELROY, Attorneys, Rogers, Arkansas.

STATEMENT OF THE CASE

On August 27, 2024, the parties filed a Joint Petition for Applicability of Workers' Compensation Jurisdiction. Upon receiving that filing, I emailed counsel for the parties and advised that if the parties could submit a Stipulation of Facts, I would be willing to decide this matter without the necessity of an evidentiary hearing. The attorneys agreed they could do so, and on October 7, 2024, filed a Joint Stipulation of Facts. I requested simultaneous briefs from the parties, and those were submitted on or before October 21, 2024.

While Staffmark Group is listed in the heading of this case, that respondent is not involved in this action, and any reference to "respondent" in this opinion is to Daugherty and Daugherty d/b/a 1st Employment Staffing.

THE JOINT STIPULATIONS

The parties submitted these joint stipulations:

"1. On March 18, 2023, Mencl and Yezenia Bastida ("Bastida") were working at Technical Machining Services ("TMS"), having been assigned there by their respective temporary employment agencies.

2. Mencl was assigned to TMS through Staffmark, a temporary employment agency.

3. Bastida was assigned to TMS through 1ST Employment, also a temporary employment agency.

4. While under the direction and control of TMS, Ms. Mencl's hand was significantly injured as she and Bastida were operating the form press machine.

5. Both Plaintiff and Ms. Bastida were assigned to TMS, either under an express or implied contract and TMS controlled the details of their work performance.

6. As a result of this incident, Mencl filed a worker's compensation claim (#H102949).

7. Mencl's worker's compensation claim has been fully paid out and closed.

8. On July 28, 2023, Mencl filed suit against 1ST Employment alleging that Bastida, while acting in the course and scope of her employment with 1ST Employment, was negligent and therefore 1ST Employment was vicariously liable for the alleged negligence of Bastida.

9. 1ST Employment filed its answer on September 21, 2023. Further, 1ST Employment filed a Motion to Dismiss or in the alternative, Motion to Stay ("Motion") pending a ruling from the Worker's Compensation Commission on April 9, 2024.

10. Mencl filed her response on May 2, 2024, and briefing was complete on May 8, 2024.

11. The Court heard the parties' argument on June 17, 2024, and ruled on July 2,

2024, that the matter should be transferred to the Worker's Compensation Commission to "determine the applicability of the worker's compensation law pertaining to this matter."

The issue presented to me on this stipulated record as set out in the Order of the Benton County Circuit Court was whether claimant is barred by the Workers' Compensation Act from pursuing a claim for personal injuries for negligence on the part of her co-worker. From a review of the stipulations of the parties and the applicable law, 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 joint stipulations agreed to by the parties are hereby accepted as fact.
2. Claimant is not barred from pursuing a tort action in Circuit Court against respondent.

FACTUAL BACKGROUND

As set forth in the accepted facts, this matter comes before me because claimant filed a third-party action against 1ST Employment Staffing in Benton County Circuit Court, seeking a judgment against respondent for damages she sustained while working through Staffmark Group at Technical Machining Services (TMS) due to the negligence of a co-worker. The Circuit Court issued this Order (in pertinent part) in transferring this matter to the Arkansas Workers' Compensation Commission:

> The Arkansas Worker's Compensation Commission has exclusive, original jurisdiction to determine the facts that establish its jurisdiction, unless the facts are so one-sided that the issue is no longer one of fact, such as an intentional tort.
>
> No such facts exist in this matter; therefore, the Arkansas Worker's Compensation Commission shall determine the applicability of the worker's compensation law pertaining to this matter.

> As such, the matter will be transferred, and the parties shall pursue a determination before the Commission as to the applicability of workers' compensation law in accordance with *Vanwagoner v. Beverly Enterprises*, 334 Ark. 12 (1998).

The parties both submitted excellent briefs, which were very much appreciated and are blue backed to the record of this case, along with the Joint Stipulation of Facts and the Order to Stay Proceedings and Transfer Issues to the Arkansas Workers' Compensation Commission entered on July 2, 2024 by Benton County Circuit Judge Christine Horwart.

ADJUDICATION

The Benton County Circuit Court asked if the Arkansas Workers' Compensation Law applied to this case. Having reviewed the statutes and case law, I find that it does not.

The exclusive-remedy provision of the Act is found at Arkansas Code Annotated §11-9-105(a), which states, in pertinent part:

> "(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 second applicable statute is §11-9-410 (a)(1)(A), which addresses third-party liability:

> "The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the rights of the employee, or his or her dependents, to make a claim or maintain an action in court against any third party for the injury…"

A.C.A. §11-9-704(c)(3) provides: "Administrative law judges, the Commission, and any reviewing courts shall construe the provisions of this chapter strictly." The doctrine of strict construction requires this court to use the plain meaning of the language employed, *Hapney v. Rheem Mfg. Co.*, 341 Ark. 548, 553, 26 S.W.3d 771, 774 (2000).

So, reading the plain language of the relevant statutory provisions, it is apparent that Arkansas law requires an employee to bring any claim for damages against an employer through a claim before the Workers' Compensation Commission, but recognizes the right of an injured party to bring a claim against a third party. The statutes do not define the term "third party," but the Arkansas Supreme Court did so in *Neal v. Oliver* 246 Ark. 377, 438 S.W.2d 313, (1969):

> "The term "third party" is not defined in the act and the first and second parties are not even mentioned, but from the language employed in the context it is used in § 1340 (a), [now §11-9-410] *supra*, "third party" can only mean some person or entity other than the first and second parties involved, and the first and second parties can only mean the injured employee and the employer or one liable under the compensation act. Thus, it is obvious from the wording of the statute, as well as common sense, that a "third party" within the meaning of the act, must be some party other than an employer who is liable under the act…"

The *Neal* case decided before the Arkansas legislature made major changes to the existing workers' compensation law in 1993. In *Miller v. Enders*, 2013 Ark. 23, 425 S.W.3d 723, the Arkansas Supreme Court stated: "The General Assembly is presumed to be familiar with the appellate courts' interpretation of its statutes, and if it disagrees with those interpretations, it can amend the statutes. Without such amendments, however, the appellate courts' interpretations of the statutes remain the law." In reviewing cases involving the exclusive remedies statute, I noted that the relevant parts of §11-9-105 and §11-9-410 (formerly §81-1304 and §81-1340, respectively) were unchanged by the 1993 amendments and therefore the interpretations of those laws became part of the statute itself.

While I agree with the parties that there is no case specifically on point in Arkansas—that being a person hired by one employment agency suing a different employment agency that had placed someone in the same business--there have been a few decisions that involved

temporary employees that were injured while working for a special employer that provide guidance on this issue. *Daniels v. Riley's Health & Fitness Centers*, 310 Ark. 756, 840 S.W.2d 177 (1992) cited Larson, The Law of Workmen's Compensation, § 48.00 (1962), under the heading "Lent Employees and Dual Employment:"

> "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." (Emphasis added).

That section which was approved by the Arkansas Supreme Court is now 5 Larson's Workers' Compensation Law, Chapter 67, with slightly different, but more helpful, wording:

> "When one employer loans its employee to a third party, the borrowing entity becomes liable for workers' compensation if:
>
> (1)the employee has made a contract of hire, express or implied, with the third party;
>
> (2)the work being done is essentially that of the third party; and
>
> (3)the third party has the right to control the details of the work.
>
> In this case the third party is deemed to be the "special employer" of the employee, the lending employer is deemed to be the "general employer," and both employers are liable for workers' compensation."

With that in mind, I cannot find that respondent is entitled to be considered a dual employer of Mencl for the simple reason that one cannot be a dual employer without first be either a general employer or a special employer. There was no employment contract between claimant and respondent, which claimant recognized when she filed a workers' compensation claim against her general employer Staffmark and the special employer, TMS. The lack of any

employment contract between claimant and respondent would have given a defense for the workers' compensation carrier for 1st Employment Staffing and ultimately defeated any workers' compensation claim that Mencl would have brought against respondent.

Without a remedy under the workers' compensation laws of this state, there is no bar to pursuing a tort remedy, see *Automated Conveyor Sys. v. Hill*, 362 Ark. 215, 208 S.W.3d 136 (2005), which includes this language:

> "… Article 2, section 13 of the Arkansas Constitution states, 'Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character….' It is clear from our case law and our constitution that a worker whose injury is not covered by the WCA [Workers Compensation Act] is not precluded from filing a claim in tort against his employer."

If an employee may sue an employer for injuries not covered under workers' compensation law, then a non-employee certainly can proceed with a tort claim.

ORDER

For the reasons set forth above, claimant is not barred by the exclusive remedy provisions of A.C.A §11-9-105 from bringing a civil action against 1ST Employment Staffing, as claimant was not employed by 1ST Employment Staffing, nor is it entitled to be considered a dual employer for the purposes of Arkansas workers' compensation law.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE