BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G903171

MICHAEL WARD, Employee	CLAIMANT
COMMERCE CONSTRUCTION CO., Employer	RESPONDENT
CINCINNATI INSURANCE CO., Carrier	RESPONDENT

OPINION FILED NOVEMBER 23, 2021

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

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

Respondents represented by KAREN H. MCKINNEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 31, 2021, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 19, 2021, and an Amended Pre-hearing Order was filed on June 7, 2021. 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 of this claim for the sole purpose of determining whether the claimant was a dual employee of Commerce Construction and PeopleReady.

2. The claimant sustained a compensable injury on May 8, 2019 to his lower extremity, left upper extremity, low back, right ear, head, right lower extremity, broken jaw and right upper extremity.

3. The claimant entered into a Joint Petition Settlement agreement with PeopleReady and the Death & Permanent Total Disability Trust Fund which was approved by the Commission on July 15, 2020.

4. The claimant filed a lawsuit in the Circuit Court of Sebastian County against Commerce Construction on September 2, 2020 related to the injury on May 8, 2019; that Commerce Construction filed a Motion to Dismiss said complaint based upon the claimant being a dual employee of PeopleReady and Commerce Construction at the time of his injury; and that the Circuit Court granted the Motion to Dismiss finding that the Arkansas Workers' Compensation Commission has original and exclusive jurisdiction to determine whether the claimant was an employee of Commerce Construction Company at the time of his injury.

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

1. Whether the claimant was a dual employee of PeopleReady and Commerce Construction on May 8, 2019, when he sustained a compensable injury.

Claimant's contentions are:

> On or about May 8, 2019, Claimant WARD, was a full-time employee with Smart Rain Irrigation.
>
> Smart Rain is an irrigation and landscape business in Fayetteville, Arkansas. Smart Rain had incurred some rain delays during the week of May 8, 2019. Claimant WARD contacted PeopleReady via an "app" to earn extra money on this open date in his work schedule, May 8, 2019 and agreed to perform some clean-up work at a Harp's grocery store in Fort Smith.
>
> Claimant WARD showed up at the facility with his own personal protection equipment. The Harp's project was a remodel being performed by COMMERCE. WARD had never heard of COMMERCE, never worked for COMMERCE, and never believed himself to be an employee of COMMERCE. He did not enter into a written or implied contract to be an employee of COMMERCE, and therefore he cannot be a dual employee under Arkansas Law. Dual employees must enter into express or implied contracts to be dual employees.
>
> There was no exclusive arrangement between Respondent COMMERCE and PeopleReady. There was no expectation or understanding that Claimant WARD would become an employee of Respondent COMMERCE.
>
> Claimant WARD was paid by PeopleReady, not Respondent COMMERCE.
>
> Respondent COMMERCE never provided Claimant WARD with any training, orientation, handbook, new employee material, uniform, work

clothing, or instruction. Claimant WARD provided his own personal protective equipment, including hard hat, safety glasses, gloves, and steel toe boots. Claimant WARD never signed any documentation of any kind with Respondent COMMERCE.

Claimant WARD had no idea he was being assigned to a worksite where Respondent COMMERCE was the general contractor. He was simply sent to an address with no indication of the name of the contractor.

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.

Claimant WARD did not enter into any type of contract for hire with COMMERCE. Commerce's attorney signed an Affidavit filed in the Circuit Court of Sebastian County acknowledging that WARD was not a W-2 employee. That affidavit is attached to this filing. Based on the first element – did Claimant WARD make a contract for hire, express or implied, with Respondent COMMERCE? The plain answer is "no." Quoting a 1954 Florida case, the Supreme Court in *Daniels* acknowledged this first factor usually decides the question:

... the solution of almost every such case finally depends upon the answer to the basic, fundamental and bedrock question of whether as to the special employees the relationship of employer and employee existed at the time of the injury. If the facts show such relationship, the existence of a general employer should not change or be allowed to confuse the solution of the problem.

Daniels v. Riley's Health & Fitness Centers, 310 Ark. 756, 759–60, 840 S.W.2d 177, 178 (1992) citing *Stuyvesant Corporation v. Waterhouse*, 74 So.2d 554 (Fla. 1954).

Respondent COMMERCE cannot point to any contract, agreement, writing, or even any oral agreement that made Claimant WARD an employee of Respondent COMMERCE. Claimant WARD already had full-time employment (with Smart Rain) and was doing one-day temporary work for PeopleReady. There is no evidence Respondent COMMERCE ever "hired" Claimant WARD as an employee.

The only remaining argument for Respondent COMMERCE is that there was an *implied* contract of employment between Respondent COMMERCE and Claimant WARD. Questions regarding contracts, express or implied, are proper for a circuit court to evaluate. There are multiple Arkansas Model Jury Instructions used for circuit courts and juries to decide contract issues. 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.Ill., 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*, 244 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.

Steed v. Busby, 268 Ark. 1, 7, 593 S.W.2d 34, 38 (1980). See also, *K.C. Properties of N.W. Arkansas, Inc., v. Lowell Inv. Partners, LLC,* 373 Ark. 14 (2008)(No implied in fact contract for restitution when no such provision was contained in subsequent contract.)

Regardless of whether a contract is express or implied, the same basic requirements apply:

In order for a contract, express or implied, to exist, there must be: (a) competent parties; (b) subject matter; (c) legal consideration; (d) mutual agreement; (e) mutual obligations. *Kearney v. Shelter Ins. Co.,* 71 Ark. App. 302, 29 S.W.3d 747 (2000); *Moss v. Allstate Ins. Co.,* 29 Ark. App. 33, 776 S.W.2d 831 (1989). Consideration is any benefit conferred or agreed to be conferred upon the promisor to which he is not lawfully entitled, or any prejudice suffered or agreed to be suffered by promisor, other than such as he is lawfully bound to suffer. *Bass v. Service Supply Co., Inc.,* 25 Ark.App. 273, 757 S.W.2d 189 (1988). Mutual promises constitute consideration, each for the other. *Freeman v. Freeman,* 20 Ark.App. 12, 722 S.W.2d 877 (1987). While mutual promises will sustain a contract, there is no valid agreement if there is no promise by one party as a consideration for the other's promise. *Eustice v. Meytrott,* 100 Ark. 510, 140 S.W. 590 (1911).

Berry v. Cherokee Vill. Sewer, Inc., 85 Ark. App. 357, 361, 155 S.W.3d 35, 38 (2004)(No consideration to support an implied contract to pay user maintenance fee to a sewer service.)

Respondent COMMERCE cannot establish the first essential element – that Claimant WARD entered into a contract with Respondent COMMERCE.

First, consider the "presumed intention of the parties as indicated by their conduct." *Steed*, above.

There was no presumed intention for Claimant WARD to be an employee of Respondent COMMERCE because:

- Claimant WARD didn't even know Respondent COMMERCE was the contractor. How can someone intend to be employed when they don't even know who the "employer" is?
- Claimant WARD had a full-time job with Smart Rain. He had no intention to become a Respondent COMMERCE employee.
- Respondent COMMERCE didn't intend for Claimant WARD to be an employee because Respondent COMMERCE
- Never provided training, instruction, handbook, or any written materials
- Never provided new-employee documents or tax forms
- Never provided a written employment agreement
- Never discussed an oral employment agreement with Claimant WARD
- Never supplied a uniform, hardhat, gloves, or safety glasses
- Didn't pay Claimant WARD – PeopleReady paid Claimant WARD

Steed also addresses the prior course of dealings as a factor in whether a tacit contract exists. Here, there are no prior dealings for Respondent COMMERCE to claim support an implied contract. Claimant WARD had never been assigned to a Respondent COMMERCE Construction job before. There are no prior dealings between Claimant WARD and Respondent COMMERCE to even consider.

Considering other cases in the realm of dual employment, those cases all turn on stronger facts supporting dual employment than those present here. In each case, there was evidence of a longer course-of-dealing between the parties or specific express contract terms about when and how the worker would transition to become an employee of the dual-employer. Those facts are not present here.

For instance, in *Randolph*, the appellate court found an implied contract based on the facts, including testimony that Randolph would become an employee of Americold after logging 240 hours on the job. Americold (not Staffmark) trained Randolph and provided him with work clothes. Americold treated Randolph like any other employee. WARD was not treated as an employee. WARD was simply performing clean up on a Saturday to make some extra money and was returning to his full-time job on Monday.

Durham v. Prime Indus. Recruiters, Inc., 2014 Ark. App. 494 also found a dual employment relationship existed based an implied contract, but to reach that conclusion the court relied on facts not present in this case. For example, Durham was trained (by the staffing agency - Elite) at the Welspun factory. An employee of Welspun specifically told Durham that he would be hired as a Welspun employee after a certain number of days without absence. He also received safety training from Welspun and signed documents confirming that training. Durham even admitted he considered himself a Welspun employee because he worked at the Welspun plant, was supervised by Welspun employees, and was promised full-time Welspun employment. Further, the staffing agency, Elite, was an on-site staff management business. Elite had an exclusive arrangement with Welspun. Elite's employees only worked at Welspun. The contract between Elite and Welspun even included a provision for liability should an employee be deemed to be employed by both Welspun and Elite. All of those facts tend to prove course-of-dealing to support an implied contract and dual employment. Yet none of those facts are present in this case.

Another Welspun case offers a similar analysis. In *Estate of Bogar v. Welspun*, 2014 Ark. App. 536, the court of appeals found an implied contract for hire to support dual employment based on the particular facts presented. The *Bogar* court also confirmed that the existence of an implied contract for hire is a fact question to be determined based on the totality of the circumstances surrounding the relationship of the parties. Those circumstances included:

Here, the Commission considered not only the right to control the work but also the relationship between the general and special employers; the role of the general employer after supplying an employee to the special employer; the nature of the market contract between the general and special employers; and the effect of that market contract upon an employee's prospects for continued employment with the general employer if terminated by the special employer.

Estate of Bogar v. Welspun Pipes, Inc., 2014 Ark. App. 536, 3, 444 S.W.3d 405, 407 (2014).

That type of evidence is simply not present in this case.

Respondent COMMERCE also cannot claim that all temporary workers are always dual-employees for purposes of applying the exclusive remedy provision of the Workers Compensation Act. In *Farris v. Express Servs.*, 2019 Ark. 141, the Supreme Court held that Farris was an employee of the temporary staffing agency (Express), and *not* an employee of Great Dane where Express had assigned Farris to work. The same is true here. The contract between PeopleReady and Respondent COMMERCE is clear – as a PeopleReady associate, Claimant WARD was the employee of PeopleReady and specifically

> *excluded* from being considered an employee of Respondent COMMERCE. Thus, Respondent COMMERCE cannot now claim that Claimant WARD was their employee for the sole purpose of avoiding tort liability."

Respondents' contentions are:

> "Respondents contend that the claimant was a dual employee of PeopleReady and Commerce Construction on May 8, 2019, when the claimant sustained a compensable injury and the claimant Joint Petitioned his workers' compensation claim on July 15, 2020 and therefore is not entitled to any additional workers' compensation benefits arising out of this injury.
>
> On the date of claimant's injury, Commerce Construction was the general contractor on a remodel job of a Harp's Food Store, Inc., in Fort Smith, Arkansas. Commerce Construction had previously contracted with People Ready, an independent staffing agency, to supply employees for clean-up work. This contract was entered into between Commerce Construction and People Ready on January 24, 2019. This contract specifically states that People Ready was not a licensed general contractor or sub-contractor; that People Ready was not responsible for Commerce Construction's obligations for its work on the project; and that People Ready would not be responsible for material or installations. This contract further provides that Commerce Construction would provide the temporary employees supplied by People Ready with any necessary supervision, training, instruction and site specific personal protective equipment. Finally, this contract provided that the employees supplied would perform work under the NCCI classification 540V-Cleanup-Debris Removal, General Helper, at a rate of $18.49 per hour. The claimant was supplied by People Ready, the general employer, to Commerce Construction, the special employer, on May 8, 2019, pursuant to this contract. Claimant presented to the job site on May 8, 2019 and was assigned the job task of cleanup and debris removal and was provided with the necessary tools of a wheelbarrow, shovel and broom. The claimant accepted this employment and was injured when a portion of a wall that was being removed by other employees of Commerce fell.
>
> Commerce Construction contends that claimant was a dual employee of both People Ready and Commerce Construction at the time of his injury. The dual employment doctrine or borrowed servant doctrine has long been recognized in Arkansas. See *Charles v. Lincoln Const. Co.,* 235 Ark. 470, 361 S.W.2 1 (1962); *South Arkansas Feed Mills v. Roberts*, 234 Ark. 1035, 356 S.W.2d 645(1962); *St. Joseph's Regional Health Center v. Munoz*, 326 Ark. 605, 934 S.W.2d 192 (1996); *Daniels v. Riley's Health & Fitness Centers*, 310 Ark. 756, 840 S.W.2d 177 (1992). In *Randolph s. Staffmark*, 2015 Ark. App. 135, 446 S.W.3d 389 (2015), the court stated, "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 injury." The court further stated, "the crucial question is whether the employer had the right to control the particular act giving rise to the

injury." *Id.* The important question in determining whether one is a borrowed-servant or dual employee is whether the employee "is to be employed in the business of and subject to the direction of the temporary employer as to the details of such act." *St. Joseph's Regional Health Center v. Munoz, supra.* at 13-14, 930 S.W.2d at 196. In *Randolph v. Staffmark*, the court held there was an implied contract of employment between the injured employee and the special employer where the injured employee was assigned by a temporary agency to work for the special employer, his contract was instituted through the temporary employment agency and there was the possibility he may have gone to work for the special employer in the future. *Randolph v. Staffmark, supra.* In *Randolph*, the Appellant was an employee of Staffmark, a temporary staffing agency assigned to appellee, Americold, to operate a forklift. Appellant was trained, received equipment and given instructions at the job by someone at Americold. Although the Appellant received his paycheck from Staffmark, the court held that Americold paid his hourly wages to Staffmark. On these facts, the court held that the Appellant was a dual employee and thus an employee of Americold.

The claimant contends that since he was a full-time employee of Smart Rain, he cannot be an employee of Commerce Construction. However, this is not the test to determine dual employment. The claimant contends that he did not work for Smart Rain on May 8, 2019 and that he contacted People Ready, a temporary employment agency for whom he had worked with in the past, for temporary work on that date. He was instructed through the People Ready app to report to work at the Commerce Construction site on the Harp's remodel job for cleanup and debris removal. There is no question that Commerce Construction was directing claimant's work on May 8, 2019 and not People Ready. Moreover, Commerce Construction and not People Ready supplied the claimant with the necessary tools of a wheelbarrow, shovel and broom to perform the cleanup-debris removal work. Neither claimant's full time employer, Smart Rain, nor People Ready had any responsibility or control over the construction project performed by Commerce Construction at the Harps' store. Commerce Construction was the general contractor of the job and had the responsibility of overseeing performance of the job. As such any supervision or direction given to the claimant could only have come from Commerce Construction. Whether the claimant was instructed to perform demolition work as he claims in the civil lawsuit, or cleanup-debris removal, the claimant could only have received these work instructions from Commerce Construction further evidencing he was "subject to the direction of the temporary employer." See Munoz, 326 Ark. At 613-14, 934 S.W.2d at 196. Thus, the answer to the crucial question is that Commerce Construction had the right to direct and control the particular acts of the claimant giving rise to his injuries. See *Randolph v. Staffmark, supra.*

Although the claimant was paid by People Ready for the work he performed on May 8, 2019 at the Commerce Construction work site, Commerce Construction paid the claimant's wages to People Ready. In *Randolph v. Staffmark, supra*. the court stated:

> Staffing or employment agencies are a part of today's market reality, and there can be no question but that Randolph provided employee services

> to Americold and that Americold treated Randolph as any other employee and paid an hourly rate for those services. Our appellate courts have repeatedly upheld a finding of dual employment and the exclusivity of the workers' compensation remedy in this context. (citations omitted)

Thus, although the claimant was paid by People Ready that was the only responsibility People Ready maintained after sending the claimant to the Commerce Construction job site. The claimant's presence at the job site was for the sole purpose of providing labor for Commerce Construction who was directing and overseeing the claimant's work.

Claimant contends that he did not enter into a contract for hire with Commerce Construction. In support of this argument, claimant relies upon the Initial AR-2 response filed by Commerce Construction denying compensability stating that the claimant was not its employee. First, the response was amended and an Amended AR-2 was subsequently filed stating that the claimant was a dual employee with People Ready. Second, Ark. Code Ann. § 11-9-529(c) specifically provides, "Any report provided for in subsection (a) or (b) of this section shall not be evidence of any fact stated in the report in any proceeding with respect to the injury or death on account of which the report was made." These forms are used to collect statistical data. The Commission requires that this data is promptly reported so as to initiate the payment of benefits in a timely manner. As such the information contained in these forms is often amended to conform to the facts as the claim is investigated and cannot be used as a binding admission against the Respondents.

Claimant also contends that since the Initial AR-2 states he was not an employee and he was not "hired" by Commerce Construction, the only means by which he could be found to be an employee of Commerce Construction is if there was an implied contract of employment. Claimant argues that there cannot be an implied contract of employment because there was no intent to enter into such a contract and list several reasons why the claimant did not have the presumed intention to become an employee of Commerce Construction. However, what the claimant fails to acknowledge is that he entered into a contractual employment relationship with People Ready to perform temporary work for entities contracted with People Ready in need of temporary employees. By accepting the work with the temporary employer, he entered into an implied contract with that particular temporary employer to perform the assigned work. He knew that he would not be performing employment duties for People Ready but for another entity whether he knew the name of that entity or not. He arrived at the job site for Commerce Construction and agreed to perform the work assigned to him by the supervisor on the job site. Once he received directions from the supervisor, the claimant accepted this assignment and thus entered into the implied contract.

Finally, claimant contends that the Arkansas Supreme Court has held that not all temporary workers are dual employees citing *Farris v. Express Services*, 2019 Ark. 141, 572 S.W.3d 863. The issue before the Court in *Farris v. Express Services* was not whether the Appellant was a dual employee but rather whether

> the statute of limitations had run on the claim. The workers' compensation claim had previously been accepted by Express Services and initial benefits had been paid. Farris filed an AR-C for additional benefits naming Great Dane Trailers as his employer. The claimant had been assigned to Great Dane as a temporary employer through Express Services. Great Dane had never accepted the claim as compensable and never paid any workers' compensation benefits to Farris. After the two year statute of limitations ran, Farris filed an amended AR-C naming Express Services as his employer. The Arkansas Supreme Court held that initial AR-C naming Great Dane as the employer did not toll the statute of limitations for additional benefits as against Express Services. The court was not asked to address whether the claimant had a valid claim against Great Dane or whether the claimant was a dual employee of both Great Dane and Express Scripts. Thus, claimant's reliance on this claim is misplaced.
>
> Once all the evidence is heard and reviewed, Respondents contend that the only conclusion that can be drawn is that the claimant was a dual employee of Commerce Construction on May 8, 2019 when he sustained his injury."

The claimant in this matter is a 25-year-old male who sustained multiple compensable injuries on May 8, 2019. The claimant was working along with the respondent's employee, Jose Salis, on a job to demolish and clean up a 10-foot tall, 30-foot long cinderblock wall at the respondent's Harp's job site in Fort Smith, Arkansas. Nearing the completion of that task the remaining wall fell on top of the claimant while he was cleaning up debris. On that date, the claimant was an employee of PeopleReady, a temporary agency that sends its employees to different locations to perform work on a temporary basis for other companies that they have contracted with. In the present matter, the other company is Commerce Construction, the respondent in this matter. The claimant entered into a joint petition settlement agreement with PeopleReady and the Death & Permanent Total Disability Trust Fund which was approved by the Commission on July 15, 2020. PeopleReady is not a party in the current matter before the Commission. The sole issue before the Commission is whether the claimant was a dual employee of PeopleReady and Commerce Construction on May 8, 2019, when he sustained multiple compensable injuries. The claimant contends he was not a dual employee in that he was an employee of PeopleReady, but not an employee of Commerce Construction. The respondent contends that the claimant was both an employee of PeopleReady and Commerce Construction and thus a dual employee which would provide

Commerce Construction 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."

There has been a sizeable amount of both in-person and deposition testimony admitted into evidence in this matter, including the deposition and in-person testimony of the claimant; deposition and in-person testimony of Ernesto Lopez, President, Project Manager, and part owner of the respondent special employer; deposition testimony of Janice Milner, an office manager; and Daniel Erwin, a superintendent for the respondent special employer. Jose Salis, a craftsman for the respondent special employer, gave in-person testimony. Finally, Nick Moscon, the owner of Smart Rain Irrigation, testified in person. The parties also admitted letters, photographs, a contract, medical records, and various other forms of documentary evidence into the record.

The first of the three factors that must be satisfied to prove that the claimant was a dual employee on May 8, 2019 is "the employee has made a contract for hire, express or implied, with the special employer" if the claimant is to be considered a dual employee. It is certain that there exists no express contract between the claimant and the respondent special employer. No such document or testimony exists in the record that would support the existence of an express contract.

I now consider whether the claimant and the respondent special employer had formed an implied contract for hire. "An implied contract is proven by showing the parties intended to contract by

circumstances showing the general course of dealings between the parties. *KC Props, of N.W. Ark., Inc. v. Lowell Inv. LLC*, 373 Ark. 14, 280 S.W. 3d (2008)." *Randolph, supra.*

The claimant in this matter was employed in a full-time capacity with a company called Smart Rain Irrigation. The claimant testified to his employment status with Smart Rain Irrigation. The claimant's attorney called Mr. Nick Moscon, the owner of Smart Rain Irrigation, as a witness in this matter. Mr. Moscon confirmed that the claimant was a full-time employee of Smart Rain Irrigation during the time of the claimant's May 8, 2019 injury. He further testified as follows:

> Q Why was he not working for you that day?
>
> A It was raining.
>
> Q Okay. Did you tell your guys that you wouldn't be working on that day so that they could find something else to do?
>
> A Yes.
>
> …
>
> Q Was it your intention that he stay working for you for quite some time?
>
> A Yes.
>
> Q And when weather did not permit you guys from working, did you expect Michael to be at work for you?
>
> A Yes.
>
> Q For instance the very next day, May 9, 2019, was it your expectation he would be at work for you?
>
> A Yes.

Mr. Moscon's testimony is supported by the testimony of the claimant. The claimant gave the following direct examination testimony:

> Q Where did you work full time at the time of this incident on May 8, 2019?
>
> A Smart Rain Irrigation & Lighting Company.

Q Did you look at that job as a career job?

A Absolutely.

Q Why did you get on your phone app and apply for a one-day Job with PeopleReady for May 8, 2019?

A Because my boss Nick told me that it would be raining on May 8th; that we would not have work.

Q When you got on your app, what kind of work did you Volunteer for?

A General like cleanup work.

Q And who was the employer for you?

A PeopleReady.

Q And who paid you?

A PeopleReady.

Q Who determined your rate of pay?

A PeopleReady.

Q And was this only a one-day job?

A Yes.

Q Where did you report for work that day?

A PeopleReady.

Q Does PeopleReady have a standalone business separate and apart from any of the places that you would work?

A Yes.

Q And did PeopleReady provide you with your personal protection equipment?

A Yes.

Q When you took this job or this assignment from PeopleReady, did they just send you to a location?

…

THE WITNESS: Harps in Fort Smith. Harps Grocery Store.

…

Q When you got to Harps to do cleanup work, had you heard of Commerce Construction?

A No.

Q Okay. Did you ever intend to be an employee of Commerce Construction?

A No.

Q Was it your intent that this was one day only?

A Yes, sir.

The claimant also testified that prior to going to work for Smart Rain Irrigation he had worked for other temporary agencies because he had the freedom to choose days he wanted to work and days he chose not to work. The claimant further testified:

Q Did you have any intent to go to work permanently for Commerce Construction on this day?

A No.

Q Why not?

A Because I had a full-time job at Smart Rain Irrigation, which was really a good opportunity for me.

Mr. Ernesto Lopez, Jr., who among other titles is the President of the respondent special employer, was called as a witness by the respondent and testified that the need for temporary workers on the Harp's project site was for "mostly cleanup." Mr. Lopez testified that his

company paid PeopleReady to fill its obligation to pay temporary employees. This is based upon a time card that is filled out by both his company and the temporary worker. He further testified that, "PeopleReady provides all of the workers' compensation insurance and all of their benefits." Mr. Lopez was asked about PeopleReady's presence at the job site as follows:

> Q Besides PeopleReady sending a temporary employee to the job site at your request, did anyone from PeopleReady ever show up on the job site?
>
> A Prior to the accident?
>
> Q Yes, prior to the accident.
>
> A No.
>
> Q Did you ever have a supervisor from PeopleReady showing up to tell PeopleReady employees what to do?
>
> A No.
>
> Q Why not?
>
> A It's not their job.
>
> Q Whose job is that?
>
> A Our job.
>
> Q And why is it your job?
>
> A Because he is our employee. He is our temporary employee. We've got to show him what to do.

On cross examination, Mr. Lopez testified about his company's relationship with PeopleReady as follows:

> Q And you have got no exclusive relationship with PeopleReady. If PeopleReady can't produce this, you will get any other labor agency; right?

A Right.

Q You are going to go with whoever is going to charge the cheapest amount for labor; correct?

A And can provide the help.

On redirect examination, Mr. Lopez was asked why the decision was made to use temporary labor at the Harp's site on May 8, 2019. That exchange follows:

Q And why did you make the decision to use temporary labor in helping to take down that wall?

A It was our manpower. Jose was in there working and Daniel was out supervising, so Jose needed help to get the cleanup done and all of that stuff.

Q And is this the type of work you would have your employees do?

A If they can, yes.

Q And it falls within the scope and duties of the general contractor; correct?

A Yes. Yes.

On recross examination, he was asked about his deposition testimony regarding cleanup and demolition as follows:

Q Mr. Lopez, I am going to remind you of your deposition –

A Okay.

Q -- taken August 17th and we are just at August 31st. Page 72, my question was, "You are not a cleanup company; correct?" And what was your answer?

A "No. We are a general contractor."

Q And then on the next page I said, "You are not a

demolition company; correct?" And what was your answer?

A "No."

Q And then I said, "You don't have any cleanup or demolition permanent employees; correct?"

A "No."

Q "You hire those subcontractors to do that?" And you said?

A "We hire temporary usually."

On direct examination Mr. Lopez was asked about his reporting of the claimant's accident to OSHA as follows:

Q Why did you report this injury to OSHA?

A So we are required to report to show when there is a hospitalization.

Q Hospitalization of whom?

A Of an employee.

Q All right. And did you consider Mr. Ward to be an employee for the purposes of reporting to OSHA?

A Yes.

On cross examination Mr. Lopez was asked about his deposition testimony regarding his reporting to OSHA as follows:

Q Mr. Lopez, do you remember giving a deposition August 17, 2021 at 10:50 about two blocks away?

A Yes.

Q Do you remember you were under oath?

A Yes.

Q Did you tell me the truth?

A Yes.

Q I am going to show you Page 19. I said, "Did you advise OSHA that he," being Michael Ward, "was not Commerce's employee, but was instead PeopleReady's employee?" And can you read your answer to me.

A The answer is highlighted?

Q The answer is highlighted.

A My answer was, "Yes."

Q Yes. You told OSHA that he is not our employee, Michael Ward, it's PeopleReady's employee; correct?

A According to that, yes.

Q And this is your sworn testimony?

A Uh-huh.

Q Correct?

A Correct.

Q You told OSHA that they needed to contact PeopleReady to discuss any training or qualifications because he wasn't your employee?

MS. McKINNEY: Objection to the form of the question. That is not the testimony that was elicited at the deposition.

THE COURT: The testimony that he just read wasn't elicited?

MS. McKINNEY: No. His testimony regarding you told OSHA that they needed to get documents from PeopleReady.

MR. HATFIELD: All right. I will ask the question.

Q [BY MR. HATFIELD]: Did you tell OSHA that they needed to get the documents from PeopleReady regarding his training and qualifications?

A I told them who the temporary agency was.

Q PeopleReady; correct?

A Yes.

Q I will show you Page 21. "Did you have conversations with Bryan Johnson in that he was the employer of Michael Ward and not Commerce Construction?" And what was your answer?

A "Yes. Correct."

Q And Bryan Johnson was the guy at PeopleReady that you told to give OSHA the training and qualification documents; correct?

MS. McKINNEY: Objection to the form of the question that He told Bryan Johnson to give documents to OSHA.

THE COURT: Rephrase your question.

MS. McKINNEY: That is not what the testimony was elicited from Mr. Lopez.

Q [BY MR. HATFIELD]: Did you tell OSHA to call PeopleReady to discuss the training because Ward was not a Commerce employee?

A I told them to call PeopleReady.

Q Because Ward was not your employee; correct?

A He is our temporary employee.

MR. HATFIELD: Let me go to your testimony. May I approach?

THE COURT: You may.

Q [BY MR. HATFIELD]: I am going to show you Page 30. I am just going to read this to you. "And Nathan Bell and Bryan Johnson, are they his bosses or who are these people?" Will you read your answer.

A "Yes. So Nathan Bell is in Fort Smith. He is local. And then Bryan Johnson is corporate."

> Q "So you were telling OSHA that they needed to contact PeopleReady to get information about Michael Ward? " And what was your answer?
>
> A "I think they asked for me to give them that information."
>
> Q And then I said, "That's all right. Because you guys never hired Michael Ward to be your employee?" And what was your answer?
>
> A "No."
>
> Q No. You are the guy that hires employees at Commerce; correct?
>
> A Yes.

Mr. Lopez admitted during cross examination that he had never heard of the claimant until he was informed that he was injured on the Harp's job site.

The deposition of Mr. Daniel Erwin, who is employed by the respondent special employer, was taken. Mr. Erwin was the superintendent in May of 2019 at the Harp's job site. At the time of his deposition he continued in his role as a superintendent for the respondent special employer. In his deposition testimony he made clear that he did not know the claimant prior to the time that he met the claimant on the Harp's job site on May 8, 2019. He further testified that he had not worked with the claimant before or after May 8, 2019.

Mr. Erwin testified that the demolition and cleanup on May 8, 2019 was to be performed on a 10-foot tall, 30-foot long cinderblock wall. Mr. Erwin was asked by the claimant's attorney in deposition testimony about the timeframe and scope of the demolition and cleanup as follows:

> Q All right. So this demolition project, was the plan to complete it all in one day, start in the morning on May 8th and finish it?

A No.

Q How long was it supposed to take?

A We figured two days.

Q Okay. So you thought it would be May 8th and May 9th?

A Yes.

Q Okay. Was there an agreement or understanding, to your knowledge, whether Michael Ward was going to come back the next day or not?

A Yes.

Q What was your understanding?

A I mean I had the discussion with People - -

Q PeopleReady.

A -- that I was going to use them for two days and that is the agreement I had.

Q Did you know it was going to be the same person because they could send you - -

A No, I do not.

Q Okay. You didn't know who the individual was going to be?

A No. I required it for two days.

Q You would have called PeopleReady? You would have called them or sent them a fax?

A I would have called them.

Q You would have called them. And again, I am not asking you to remember exact dates and times, but probably a day or two before May 8th and said I'm going to need workers for two days; right?

A Right.

Q Okay. Did you tell them what those workers were going to be doing?

A Yes.

Q What did you tell them?

A Cleanup.

Q Okay. Did you tell them that it was going to involve a demolition of a 30-foot long, 10-foot tall cinderblock wall?

A Yes.

Q You told them that? You told PeopleReady that?

A That he would be cleaning up; that we are taking down a wall, yes.

Later, in questioning by the claimant's attorney, Mr. Erwin was again asked about the timeframe for the demolition and cleanup as follows:

Q Okay. Was the plan to finish the demolition that day?

A Actually, it was already quitting time, so I was actually going to call it a day, but Michael and Jose both wanted to finish. That's the discussion we had a 3:30.

Q And from some of the OSHA reports, it looks like Junior charted it as happening at 3:40 p.m. Does that sound about right?

A Roughly.

Q You wouldn't have any reason to disagree with that, though?

A No.

Mr. Erwin was asked in deposition testimony about his first encounter with the claimant as follows:

> Q What time, if you can remember, May 8, 2019, what time did you arrive at the Harp's project in Fort Smith?
>
> A I believe it was a little later than 7:00. It was 7:10, 7:15, somewhere in there.
>
> Q And what was Michael Ward doing when you first got there?
>
> A He was in his car.
>
> Q Did you know the name of the PeopleReady employee that was going to be there that day beforehand?
>
> A I did not.
>
> Q Did you initially go up to him or did he initially go up to you?
>
> A I went to him.
>
> Q How did you know who he was?
>
> A He called me as I was coming down.
>
> Q Michael Ward called you?
>
> A Yes.
>
> Q Okay. And what did he tell you?
>
> A He said, "I am from PeopleReady," and he was looking for me and I said that I had just pulled in the parking lot. I was in a big, white van and I just described it. And he told me what car he was in, which I can't remember what it was.
>
> Q Okay. So then you walked over to his car?
>
> A Yes.
>
> Q Okay. And then what did you all do?

A I basically took him to the area that we were going to start in and just described to him what we were doing for that day.

Q Took him to the wall?

A Area, yes.

Q Okay. But you didn't take Michael Ward anywhere else throughout the Harp's, did you?

A No.

Q You knew what he was going to be doing was the demolition of the cinderblock wall?

A He was going to be doing the cleanup.

Q Okay. But it was all related to that cinderblock wall?

A Yes.

Q He wasn't going to be sweeping the hallways or doing cleanup anywhere else in the store?

A No.

Q That is true, though; right?

A Yes.

Mr. Erwin was questioned by the respondent special employer's attorney about directions he had given to the claimant about his work that day as follows:

Q What do you recall of the conversation you had with Mr. Ward when you spoke to him about what was going to be done that day?

A I just told him that we were going to demolition. I showed him the wall. I told him that Jose was going to, you know, demo the wall and that he was there to clean up and help Jose clean up the wall.

Q If you had not told Mr. Ward that, would he have known what to do?

MR. DANIELS: Form. Calls for speculation.

THE WITNESS: No.

Q [BY MS. MCKINNEY]: All right. And why not?

A Because it's my job to tell him.

Q And why was it your job?

A Because I was in charge of the job.

However, the claimant's attorney asked Mr. Erwin about any specific instructions to the claimant as follows:

Q And did you give any - - and I know this may sound kind of silly, Mr. Erwin, but did you give any specific instructions to Michael Ward as far as how he was supposed to pick up rubble and put it in the SkyTrak box bucket?

A No.

Q Okay. Did Michael Ward, to your knowledge, appear to be a good worker?

A Yes.

Mr. Erwin testified that the claimant provided his own gloves, safety goggles, hard hat, and steel-toed boots. However, he testified that the claimant was supplied with a broom and shovel by the respondent special employer. Mr. Erwin testified that the claimant was not provided a shirt bearing the company's mark -- the same shirt that both he and Mr. Jose Salis, a craftsman for the respondent employer, wore. Mr. Salis worked with the claimant throughout the day.

Mr. Erwin was also questioned by the claimant's attorney about his knowledge of the claimant's intention for employment as follows:

> Q All right. So let me make sure I understand that. On May 8th, Michael Ward told you that he had a full-time job with an irrigation company; right?
>
> A Yes.
>
> Q Okay. And then for whatever reason they weren't working that day, so this was a one-time deal to make some extra money?
>
> A Correct.
>
> Q So you and Michael Ward knew under no circumstances was Michael Ward ever going to become an employee of Commerce Construction?
>
> A Yes.
>
> Q Okay. You couldn't hire him if you wanted to and Michael Ward told you specifically he had no intention of becoming an employee of Commerce Construction because he had a full-time job?
>
> A He told me he had a full-time job, yes.

The respondent special employer's attorney called Mr. Jose Salis as a witness. Mr. Salis works for the respondent special employer as a craftsman and has done so for 20 years. Mr. Salis worked with the claimant on May 8, 2019 in the demolition and cleanup of the wall at the Harp's jobsite. The respondent special employer's attorney asked Mr. Salis about instructions he gave the claimant as follows:

> Q All right. And did you tell Mr. Ward what he needed to do at that point?
>
> A Yes, ma'am.

Q And what did you tell him to do?

A He was going to help me clean up.

Q What were you doing?

A Knocking the wall down.

Q Did he help you knock the wall down?

A Probably a few times he came and he swing the sledge-hammer when I was not there.

Q Okay. When you weren't there?

A Yes.

Q So you did see him swing a sledgehammer?

A Yes.

Q Did you tell him to swing a sledgehammer?

A No.

Q What did you do when you saw him doing that?

A I told him to stop.

Q Why?

A Because it's not his job.

On cross examination by the claimant's attorney, Mr. Salis was asked about the claimant's ability to make decisions about his presence on the jobsite as follows:

Q And was he free to use the bathroom or smoke or whatever?

A Yes, sir.

Q He could take as many breaks as he wanted?

A Yes, sir.

Q And he took his own lunch and left the job site?

A Yes, sir.

The respondent in this matter introduced a copy of a contract between PeopleReady and the respondent special employer which is found at Respondent's Exhibit 1, Pages 1 and 2. That contract was signed on January 24, 2019 by Mr. Lopez who was apparently the Vice-President at that time. The contract titled "Offer to Supply Temporary Associates" includes the following language regarding the respondent special employer's hiring of PeopleReady associates. "Unless otherwise agreed to by both parties, you may not hire or convert an associate to your payroll, or to a third party's payroll, whether directly or indirectly, until such associate has worked 520 hours. If you directly or indirectly hire or cause to be hired by any third party, any current associate during the term of this agreement, or within one hundred twenty (120) days after the last date associate worked on assignment with you, you agree to pay supplier a conversion fee equal to 10% of the associate's annual wages. Hiring of any current or former associate pursuant to this agreement shall be limited to no more than 10% of the associates assigned to you during the previous six (6) months. If you hire a current or former associate, without prior written notice to PeopleReady, within the one hundred twenty (120) days after the associate worked on assignment with you, you agree to pay an additional penalty equal to 20% of the associate's annual wages."

At the hearing in this matter Mr. Lopez, who was at the time of his testimony and at the time of the claimant's injury the President of the respondent special employer, gave testimony on direct examination about disciplining the claimant as follows:

Q So who had the authority to direct Michael Ward when he showed up on the job site at Harps?

A Daniel and Jose.

Q If Michael Ward was not working in a safe manner or he was off doing something he wasn't supposed to do, who had the authority to discipline him on the job site?

A I guess Daniel and Jose, but Jose would probably tell Daniel what was going on.

Q Would you require or need PeopleReady to come there and discipline him?

A No.

Q And why not?

A It's not their job.

Q Whose job is it?

A Ours.

Q Why?

A Because he is our employee.

That testimony is directly in conflict with the contract he signed with PeopleReady which in Paragraph 2 states: "If you are not satisfied with an associate for any reason, simply let us know within two (2) hours of the associate's arrival and you will not be billed for that time. PeopleReady's sole warranty is the replacement of unsatisfactory associates." It was not the respondent special employer's duty to discipline the claimant if need be. It was the respondent special employer's duty to contact PeopleReady and they would remove and replace the claimant without charge if they did so within the first two hours of his arrival.

The central question is whether or not the claimant had made an implied contract for hire with the respondent special employer. Given the totality of the circumstances, the course of conduct between the parties, and the general course of dealings between the parties, I do not believe it to be reasonable that an implied contract existed.

It is undisputed that the claimant was a full time employee of Rain Smart Irrigation on May 8, 2019. On that particular day he was unable to work for his full time employer due to inclement weather. Mr. Erwin, the job superintendent, became aware of this on May 8th, 2019, and understood that the claimant never intended for this to be more than a one day engagement. The claimant had done work for temporary agencies in the past and viewed it to give him freedom to make decisions about when he wanted to and did not want to work. The respondent special employer did not have an exclusive relationship with PeopleReady. They would use whatever temporary service agency that could provide labor at the cheapest rate.

Mr. Lopez, the President of the respondent special employer, did not feel that the claimant was an employee when he reported the claimant's injury to OSHA. Instead, he laid that questioning on PeopleReady, who he clearly believed was the claimant's employer for the purpose of OSHA reporting. I note that Mr. Lopez contradicted his deposition testimony at the hearing in this matter, which injured his credibility.

It appears that Mr. Erwin had planned for the demolition and clean up of the wall to last for at least two days; however, at the request of the claimant and Mr. Salis, the work continued after normal hours so it could be completed. Mr. Erwin's instructions to the claimant were very limited. He simply told him the wall was to be demolished and he "was there to clean up." He testified further that he gave the claimant no specific instructions about cleaning up the rubble. The claimant provided his own safety equipment including gloves, goggles, hard hat, and steel-

toed boots. The respondent special employer did, however, make available a shovel and a broom as testified to by Mr. Erwin.

The claimant never had any intention to become associated with the respondent special employer for any period of time longer than May 8, 2019. Mr. Erwin's testimony shows he knew that on May 8, 2019 and had no intent for the claimant to be associated with the respondent special employer for any period of time any longer than would be required for the demolition and cleanup of the Harp's site wall, even though he acknowledged the claimant to be a good worker in his testimony. Mr. Salis' testimony shows very little instruction from the respondent special employer to the claimant; essentially, clean up debris. It also shows that the claimant had the freedom to stop and start work at his own will. The respondent special employer had very little control over the claimant, including an inability to discipline him. Instead, they were to contact PeopleReady who would replace the claimant at no charge if it was done within the first two hours of his site arrival.

The pool of dual employment cases in Arkansas case law is somewhat limited. The majority of those cases deal with general employers and special employers who have an exclusive relationship, cases where the lent employee is engaged in an effort to become a permanent employee of the special employer, or the association is for at least a period of several days. This case is unlike those cases. Here, the claimant simply intended to labor for a day for the special employer assigned by his general employer and then return to his full time job the very next day. In fact, the respondent special employer in this matter had no intention of keeping or dealing with the claimant any longer than it took to demolish and clean up the cinderblock wall. The claimant and the special employer had no express or implied contract and thus, the special employer is not a dual employer of the claimant. I note that I do not believe the

respondent special employer could prove the second or third parts of the dual employment test. The respondent special employer is not in the business of demolition or cleanup. They are in the general contracting business as stated by Mr. Lopez in his deposition testimony. The respondent special employer had very limited control over the details of the work. Testimony is clear from Mr. Erwin that he gave the claimant no specific instruction on how to perform cleanup. Both Mr. Erwin and Mr. Salas simply told the claimant to clean up the cinderblock rubble. While they did provide him a shovel and a broom, it was up to the claimant to provide safety equipment including gloves, safety glasses, steel-toed boots and a hardhat. The respondent special employer is unable to prove that the claimant was a dual employee.

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 May 19, 2021, and contained in an Amended Pre-hearing Order filed June 7, 2021 are hereby accepted as fact.

2. It has been proven beyond a preponderance of the evidence that the claimant was not a dual employee of PeopleReady and Commerce Construction on May 8, 2019 when he sustained compensable injuries.

ORDER

The respondent special employer is unable to prove that the claimant was a dual employee and thus is not afforded the protections granted to employers under the Arkansas Workers' Compensation Act.

IT IS SO ORDERED.

_____

ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE