BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

AWCC NO. G903171

MICHAEL WARD, EMPLOYEE	CLAIMANT
COMMERCE CONSTRUCTION CO., EMPLOYER	RESPONDENT
CINCINNATI INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 16, 2022

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

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

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents appeal the decision of the administrative law judge ("ALJ"), finding, among other things, that Claimant was not a dual employee of PeopleReady and Commerce Construction Company ("Commerce") on May 8, 2019, when he sustained compensable injuries. The Full Commission reverses this decision and, as set out more fully below, finds that Claimant was a dual employee of PeopleReady and Commerce on May 8, 2019.

I. BACKGROUND

The facts relevant to the issue before us are not in dispute. In May 2019, and thereafter, Claimant was working full time for a landscape business.[1] On some days, because of rain or other reasons, the landscape business was unable to provide work for Claimant. On days the landscape business had no work for Claimant, he sought work from a staffing agency called PeopleReady. On May 8, 2019, the landscape business had no work available for Claimant, so he opened the PeopleReady app, and found work at Commerce's jobsite doing cleanup and debris removal.

When Claimant arrived at Commerce's jobsite, he had with him the personal protective gear he would be wearing that day (gloves, safety goggles, a hard hat, and steel-toed boots), but had no tools with him. Upon arrival to Commerce's jobsite, Claimant called Commerce's job superintendent Daniel Erwin. Mr. Erwin met up with Claimant and then introduced Claimant to Jose Salis, a craftsman employed by Commerce. Mr. Erwin explained to Claimant that Mr. Salis would be demolishing a concrete-block wall and that Claimant would be working with Mr. Salis to clean up and remove the debris. Respondent provided Claimant with the tools necessary to perform the job (a shovel, broom, and wheelbarrow).

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1 The landscape business is not relevant to this case and the Full Commission has left out its name simply for clarity's sake.

Mr. Salis testified that it was his job to demolish the concrete wall and not Claimant's. He also testified that as the two worked together throughout the day, Mr. Salis caught Claimant swinging a sledgehammer to demolish the wall and that Mr. Salis told Claimant not to do that job and to only do cleanup work. Mr. Salis directed Claimant where to put the debris. At day's end, Mr. Erwin was going to call it a day and conclude the work the following day; however, both Claimant and Mr. Salis wanted to continue working until the project was completed so they forged on. A few minutes later, the remaining part of the wall came tumbling down on Claimant.

Commerce reported the injury to OSHA, and Mr. Erwin testified that they did so because they are required to report injuries of their employees. When OSHA asked for specifics about Claimant (*e.g.*, date of birth, social security number, etc.), Commerce told OSHA that it would have to gather that background information from PeopleReady.

II. STANDARD

The Arkansas Workers' Compensation Commission has exclusive jurisdiction to decide whether an employee-employer relationship exists. *See Johnson v. Bonds Fertilizer, Inc.*, 375 Ark. 224, 227, 289 S.W.3d 431, 433 (2008). The Arkansas Workers' Compensation Law applies to a special employer, under the dual-employment doctrine, if three elements are met: (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. *Randolph v. Staffmark*, 2015 Ark. App. 135, at 7, 456 S.W.3d 389, 393.

III ADJUDICATION

A. Did the parties have an implied contract?

"An implied contract is proven by showing the parties intended to contract by circumstances showing the general course of dealing between the parties." *Id*. "Staffing or employment agencies are a part of today's market reality [and] [o]ur appellate courts have repeatedly upheld a finding of dual employment and the exclusivity of the workers' compensation remedy in this context." *Id.*

Here, Claimant showed up at Commerce's jobsite, reported to – and got his marching orders from – Commerce's superintendent. Specifically, here, Commerce agreed to hire Claimant to do the cleanup and debris removal work and Claimant agreed to do that work. This is clearly evident from the fact that Commerce told Claimant to get to work cleaning up the debris and Claimant went to work cleaning up the debris. In fact, this work (cleanup and debris removal) was the very work Claimant was performing when he was injured.

Claimant argues that he could not have contracted with Commerce because he already had a fulltime job with the landscape company, which he had no intention of leaving. Claimant's argument is

premised on the notion that the "contract for hire" contemplated by Arkansas' application of the dual-employment doctrine requires a contract for fulltime, long-term employment. The dual-employment doctrine does not require that the "contract for hire" be long-term or permanent. Although the "general course of dealings between the parties" only lasted a day, a day is sufficient to show that an implied contract existed.

The other problem with Claimant's argument is that it is premised on the notion that an employee can have only one employer at a time. As noted above, our courts have consistently held that staffing agencies and temporary agencies such as PeopleReady are part of today's marketplace and our courts have consistently held that these staffing agency—contractor relationships satisfy the dual-employment doctrine. For example, in *Durham v. Prime Indus. Recruiters, Inc.*, 2014 Ark. App. 494, at 11-12, 442 S.W.3d 881, 887, the court held who writes the employee's paycheck is one of mechanics and not substance and does not control the analysis.

Randolph, *supra*. In fact, Professor Larson's treatise, *The Law of Workmen's Compensation*, from which the three elements of the dual-employment doctrine here applied were adopted, makes clear that an employee can have two or more employers at a time. "Employment may also be 'dual' in the sense that . . . the employee is under contract of hire with two different employers . . .." *Id.*; *see also*, *Daniels v. Riley's Health &*

Fitness Ctrs., 310 Ark. 756, 759, 840 S.W.2d 177, 178 (1992). Accordingly, this argument is without merit.

Based upon our *de novo* review of the entire record, the Full Commission finds that the preponderance of the evidence demonstrates that Claimant and Commerce had an implied contract for the cleanup and debris removal job that Claimant was performing when he was injured.

B. Was the work being done essentially that of Commerce?

Claimant reported to work on Commerce's jobsite, contacted Commerce's job superintendent, and got his instructions from Commerce. Claimant worked for Commerce cleaning up debris on a wall that Commerce was hired to tear down. Claimant provided his attire, but Commerce provided Claimant with the tools necessary to accomplish the job and provided Claimant with instructions on how to accomplish the job.

Based upon our *de novo* review of the entire record, the Full Commission finds that the preponderance of the evidence demonstrates that the work Claimant was performing when he was injured was essentially that of Commerce.

C. Did Commerce have the right to Control the work being done?

Commerce had the right to control the work Claimant was doing on May 8, 2019. Commerce's job superintendent, Mr. Erwin, directed Claimant to work with Commerce's craftsman, Mr. Salis, cleaning up debris from the wall demolition. According to Mr. Salis's unrebutted testimony,

when Claimant attempted to use the sledgehammer to demolish the wall, Mr. Salis instructed him to only perform cleanup and debris removal. Likewise, at the end of the day when Mr. Erwin allowed the two to continue working, he had the authority to send the two employees home for the day or to allow them to continue working.

The contract between PeopleReady and Commerce states in part, "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." This does not indicate that it was somehow PeopleReady's responsibility to remove a worker from a job. Likewise, it does not indicate that PeopleReady had the right to control the work Claimant was assigned to do. Instead, it indicates that PeopleReady would not bill Commerce for a worker's time if Commerce reported its dissatisfaction within two hours of the worker's arrival. Commerce would still be the entity that decided that it was dissatisfied with the worker's performance, and it would be within Commerce's right to terminate any further relationship with the employer.

Based upon our *de novo* review of the entire record, the Full Commission finds that the preponderance of the evidence demonstrates that Commerce had the right to control the work being done.

III. CONCLUSION

As set out above, the Full Commission finds, based upon our *de novo* review of the entire record, that the preponderance of the evidence

demonstrates that (1) Commerce and Claimant had an implied contract for the work Claimant was performing for Commerce on May 8, 2019; (2) the work Claimant was performing for Commerce on May 8, 2019 was essentially that of Commerce; and (3) Commerce had had the right to control the work being done by Claimant on May 8, 2019. Accordingly, the Full Commission finds that Claimant was a dual employee of Commerce Company and PeopleReady on May 8, 2019.

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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CHRISTOPHER L. PALMER, Commissioner

Commissioner Willhite dissents.

DISSENTING OPINION

After my de novo review of the record in this claim, I dissent from the majority opinion finding that Claimant was a dual employee of PeopleReady and Commerce on May 8, 2019.

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 389; *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 claimant worked as a full-time employee for Smart Rain Irrigation. On May 8, 2019, the claimant took a temporary assignment through PeopleReady to earn some extra income. The claimant testified that he never intended to enter into an employment agreement with Commerce Construction (hereinafter, "Commerce"). In fact, the day of the accident was the only day he was assigned to work at Commerce's location.

It is clear from the evidence and testimony that the claimant did not have an express contract with Commerce; thus, the question is whether there was an implied contract for hire between the claimant and Commerce. I find that no such contract existed.

An implied contract is proven "by showing the parties intended to contract by circumstances showing the general course of dealings between the parties". *Randolph*, *supra*.

The course of dealings between the parties here does not demonstrate that Commerce stood in the role of the claimant's employer on

May 8, 2019. Perhaps most telling is the deposition testimony of Ernesto Lopez, the President of Commerce. Mr. Lopez testified that he advised OSHA that the claimant was not Commerce's employer, but instead he was PeopleReady's employee. Additionally, no one employed by Commerce provided the claimant with training, a handbook or any other written materials. Commerce did not provide the claimant with a uniform or PPE. The claimant was not paid by Commerce, but instead received payment for the work performed on May 8, 2019, from PeopleReady.

Because the respondent is unable to establish that there was a contract for hire, the requirements for dual-employment cannot be satisfied. Therefore, for the aforementioned reasons, I find that the claimant was not a dual employee of PeopleReady and Commerce Construction on May 8, 2019.

For the foregoing reason, I dissent from the majority opinion.

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M. Scott Willhite, Commissioner