Cite as 2024 Ark. App. 150

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-22-593

MICHAEL WARD APPELLANT V. COMMERCE CONSTRUCTION CO., INC.; AND CINCINNATI INSURANCE CO. APPELLEES	Opinion Delivered February 28, 2024 APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [NO. G903171] AFFIRMED

WENDY SCHOLTENS WOOD, Judge

Michael Ward appeals a decision of the Arkansas Workers' Compensation Commission (Commission) finding that he was a dual employee of Commerce Construction Company, Inc. (Commerce), and PeopleReady, a temporary staffing agency. The Commission's decision protects Commerce from tort liability under the exclusive-remedy provisions of the Arkansas Workers' Compensation Act (Act). Ward brings two points on appeal: (1) the Commission erred by finding that temporary-staffing-agency/contractor relationships satisfy the dual-employment doctrine, and (2) there is no substantial evidence to support the Commission's decision that Ward was a dual employee. We affirm.

Ward testified at the hearing before the administrative law judge (ALJ) that in May 2019, he worked full time for a landscape company. On days the landscape company was

unable to provide work, Ward sought work from PeopleReady. On May 8, 2019, rainy weather prevented Ward from working for the landscape company, so he applied for a one-day job on the PeopleReady phone app. The PeopleReady app assigned Ward to Commerce, for whom Ward had never worked, and provided the assignment location—Harp's Grocery Store in Fort Smith. All PeopleReady told Ward about the job was that he would be a "general helper."

The president of Commerce, Ernesto Lopez, testified that Commerce contracted with PeopleReady to supply temporary employees, mainly for cleanup, for its construction projects. Pursuant to the contract between PeopleReady and Commerce, Commerce kept track of the number of hours the temporary employee worked on a timecard, which it provided to PeopleReady. PeopleReady then paid the employee and sent an invoice based on the contract's hourly rate to Commerce, which then paid PeopleReady. The contract provided that PeopleReady was responsible for the employee's workers' compensation insurance and any other benefits. PeopleReady did not supervise the work of the employees it provided to Commerce or instruct them how to do the job. Commerce did. Lopez testified that Commerce considered Ward to be a temporary employee of Commerce and had no intention of making him a permanent employee.

When Ward arrived at the jobsite, he called Commerce's job superintendent, Daniel Erwin, to give him instructions about the work he was to perform. Erwin came to the site, introduced Ward to Jose Salis, a long-time Commerce employee, and explained to Ward that Salis was there to demolish a cinder-block wall on the property. Erwin told Ward that his

job was to help Salis clean up the wall as it was knocked down. Salis gave Ward instructions on how to perform the job, specifically telling Ward that he would not be using the sledgehammer but would only be cleaning up the debris. Although Ward arrived at the site with his own protective gear (gloves, safety goggles, a hard hat, and steel-toed boots), Commerce provided him with the tools necessary to perform the job: a shovel, a broom, and a wheelbarrow.

At "quitting time," Erwin was going to "call it a day" and finish the job the next day, but Salis and Ward wanted to continue working until the project was completed, so they forged on. A few minutes later, the remaining wall fell down on Ward, causing severe injuries. Commerce reported the injury to the Occupational Safety and Health Administration (OSHA). When OSHA asked for specific information about Ward's training and qualifications, Commerce told OSHA that it needed to contact PeopleReady.

On July 15, 2020, the Commission approved a settlement agreement for benefits between Ward, PeopleReady, and PeopleReady's workers' compensation insurer. On September 2, Ward filed a negligence lawsuit against Commerce in the Sebastian County Circuit Court. Commerce moved to dismiss the lawsuit, arguing that Ward was a dual employee of PeopleReady and Commerce at the time of the injury and that his exclusive remedy is under the Act. The circuit court granted the motion, finding that the Commission has original and exclusive jurisdiction to determine whether Ward was an employee of Commerce at the time of the injury under the dual-employment doctrine.

After conducting a hearing, the ALJ found that Ward was not a dual employee of PeopleReady and Commerce and therefore that Commerce was not afforded the protections from tort liability granted to employers under the Act. Commerce appealed to the Commission, which reversed the ALJ's decision. The Commission found that Commerce and Ward had an implied contract for the work Ward performed on May 8, 2019; that the work was "essentially that of Commerce"; and that Commerce had the right to control the work. The Commission concluded by finding that Ward was a dual employee of Commerce and People Ready on May 8. Ward appeals the Commission's decision.

In workers' compensation appeals, this court reviews the evidence and all inferences in the light most favorable to the Commission's findings and affirms if the decision is supported by substantial evidence. *Randolph v. Staffmark*, 2015 Ark. App. 135, at 1, 456 S.W.3d 389, 390–91. Substantial evidence exists only if reasonable minds could have reached the same conclusion without resort to speculation or conjecture. *Id.* at 1–2, 456 S.W.3d at 391. We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the Commission's conclusions. *Id.* at 2, 456 S.W.3d at 391.

Pursuant to the dual-employment doctrine, when a general employer lends an employee to the special employer, the special employer becomes liable for workers' compensation benefits only if three factors are satisfied:

(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.

Daniels v. Riley's Health & Fitness Ctrs., 310 Ark. 756, 759, 840 S.W.2d 177, 178 (1992) (quoting 1C Arthur Larson, *The Law of Workmens' Compensation*, § 48.00 (1962)). The solution in almost every dual-employment 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." *Randolph*, 2015 Ark. App. 135, at 2, 456 S.W.3d at 391. If the facts demonstrate this relationship, then the existence of a general employer should not change or be allowed to confuse the solution to the problem. *Id.* at 2, 456 S.W.3d at 391. Because both employers may each have some control, there is nothing logically inconsistent when using this test in finding that a given worker is the employee of one employer for certain acts and the employee of another for other acts. *Id.* at 2, 456 S.W.3d at 391. The crucial question is which employer had the right to control the particular act giving rise to the injury. *Id.* at 2, 456 S.W.3d at 391.

Ward first contends that the Commission's decision "suggests" that it either created or relied on a bright-line rule that workers provided by temporary staffing agencies are always dual employees of the business where the workers are assigned. He argues that this contradicts the requirement to apply the three-pronged test to determine whether dual employment exists and that it violates the strict-construction mandate for workers' compensation statutes. As proof of its application of a bright-line rule, Ward references the Commission's reliance on this court's recognition that staffing agencies such as PeopleReady

are "part of today's market reality" and that our courts have repeatedly upheld a finding of dual employment in this context. *Id.* at 7, 456 S.W.3d at 393.

We disagree that the Commission applied a bright-line rule in this case. The Commission's opinion specifically set forth the three-pronged test, analyzed each prong in three separately designated sections, and concluded with the following paragraph:

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

The Commission recognized that a contract for hire, whether express or implied, need not be long term or permanent and that the general course of dealings between the parties may have lasted only a day. Further, the Commission noted that the fact that an implied contract was instituted through a temporary employment agency does not, in and of itself, negate a finding of dual employment. *See id.* at 6, 456 S.W.3d at 393. The Commission did not apply a bright-line rule in this case.[1]

[1]Ward also contends that the Commission erred as a matter of law by failing to consider the Empower Independent Contractors Act of 2019. Ark. Code Ann. §§ 11-1-201 et seq. (Supp. 2023). He argues that the weight of the factors listed in the Act would "favor a finding that Ward was an independent contractor and not an employee." Because Ward failed to raise this issue or obtain a ruling on it from the Commission, which he admits on appeal, his argument is not preserved. *Gray v. Johnson Emp. Servs., LLC*, 2010 Ark. App. 812, at 3.

Ward also argues that substantial evidence does not support the Commission's finding that he was a dual employee of PeopleReady and Commerce. Ward's primary challenge is to the Commission's finding on the first prong of the three-prong analysis: that is, that there was an implied contract between him and Commerce. The existence of an implied contract for hire is a fact question to be determined on the basis of the totality of the circumstances surrounding the relationship between Commerce and Ward. *Id.* at 3, 456 S.W.3d at 391. An implied contract is proved by evidence of circumstances showing that through the general course of dealing between the parties, the parties intended to contract. *City of Batesville v. Indep. Cnty.*, 2023 Ark. App. 401, at 14, 678 S.W.3d 35, 43.

Ward argues that there was no implied contract between him and Commerce because he already had a full-time job, had no intention of becoming a Commerce employee on the day of the injury, and had agreed to work only one day. He points out that Commerce had no intention of him becoming its employee, did not provide any job training to him, and did not pay him. Ward also argues that in cases in which we have held that an employee of a temporary agency is a dual employee of the business to which the employee was assigned, 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 from being an employee of the general employer to being an employee of the special employer. For instance, he argues that in *Randolph*, both the employee (Randolph) and the special employer (Americold) believed that Randolph would become a full-time employee after he had logged sufficient hours on the job, Americold trained Randolph, and Americold treated Randolph like any

other Americold employee. 2015 Ark. App. 135, at 6, 456 S.W.3d at 393. Ward contends that none of those things occurred here. He also cites *Durham v. Prime Industrial Recruiters*, 2014 Ark. App. 494, 442 S.W.3d 881, as another example in which we affirmed the Commission's finding of an implied contract between Durham and Welspun where Durham was trained at Welspun's factory, was specifically told by Welspun that he would be hired as a Welspun employee after a certain time, and considered himself a Welspun employee.

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. Each case depends on its own particular facts. *Steinert v. Ark. Workers' Comp. Comm'n*, 2009 Ark. App. 719, at 7, 361 S.W.3d 858, 863; *see Randolph*, *supra* (upholding finding of implied contract where temporary employee placed by staffing agency was injured in his first week on the job); *Daniels*, 310 Ark. 756, 840 S.W.2d 177 (upholding finding of implied contract where injured employee was temporary employee placed by staffing agency); *Beaver v. Jacuzzi Bros.*, 454 F.2d 284, 285 (8th Cir. 1972) (holding that under Arkansas law, worker on temporary assignment from Kelly Girl to Jacuzzi Brothers, injured after two weeks on the assignment, was bound by exclusivity provision of workers' compensation law).We acknowledge that the facts of this case are unique in that the duration of Ward's employment with Commerce was just one day. Nevertheless, on that day, Ward accepted the job to work for Commerce; showed up and performed work as requested and directed by Commerce employees; and was paid by Commerce for his services, albeit indirectly. Reviewing the

evidence and all inferences in the light most favorable to the Commission's findings, we hold that substantial evidence supports its finding that there was an implied contract between Ward and Commerce on the day Ward was injured.

We further note that the dual-employment cases focus primarily on which employer had the right to control the particular act giving rise to the injury—whether that control lasted for a month, a week, or a day—which brings us to elements two and three of the three-part analysis: whether the work being done at the time of the injury was that of Commerce and whether Commerce had the right to control the details of that work. *Randolph*, 2015 Ark. App. 135, at 2, 456 S.W.3d at 391. Ward argues that Commerce did not have the right to control the details of his work, claiming he made his own decisions about when to take a break and lunch; that he arrived wearing his own gloves and steel-toed boots and was not provided a Commerce t-shirt; that Commerce did not provide him with training materials or go over safety with him; and that he made his own decision to pick up the cinder blocks with his hands, rather than using the shovel provided. The question here is not whether Ward retained some control over his own actions while at Commerce. The crucial question is which *employer* had the right to control the particular act giving rise to the injury. *Id.*, 456 S.W.3d at 391.

The Commission found that Ward reported to work on Commerce's jobsite; contacted Commerce's superintendent, Erwin; and got instructions from both Erwin and Salis about cleaning up debris from a wall that Salis was going to demolish. Commerce also provided Ward with the tools necessary to perform the job. No PeopleReady personnel were

on the jobsite, no PeopleReady employee instructed Ward how to perform the job or even exactly what the job entailed, and PeopleReady's only description to Ward of this job was "general helper." And while neither Ward nor Commerce intended for their relationship to be a permanent-employment situation, Lopez, the president of Commerce, testified that Commerce intended for Ward to be its employee, albeit temporary. Finally, although his paycheck was provided by PeopleReady, the ultimate responsibility for Ward's wages lay with Commerce. It is the Commission's duty to make determinations of credibility, to weigh the evidence, and to resolve any conflicts in the testimony, and we are bound by its decisions on these matters. *CHI St. Vincent Infirmary Med. Ctr. v. McCauley*, 2023 Ark. App. 126, at 7, 663 S.W.3d 411, 417. We hold that there is substantial evidence to support the Commission's finding that the work being done was essentially that of Commerce and that Commerce had the right to control the details of the work.

Finally, Ward argues that Commerce has improperly argued inconsistent positions by telling OSHA to contact PeopleReady for employment and qualification information about Ward and by failing to contribute to Ward's workers' compensation claim. Ward claims that Commerce should be "collaterally estopped" from now claiming to be Ward's employer. Ward's argument is not well taken.

The Commission held that Ward was a dual employee of PeopleReady and Commerce. The contract between PeopleReady and Commerce requires PeopleReady to provide general-liability and workers' compensation insurance for the temporary employees

it assigns to Commerce.[2] Ward's claim was considered compensable, and he received workers' compensation benefits.

Again, there is no dispute that Ward was an employee of PeopleReady; thus, it was not "inconsistent" for Lopez to direct OSHA to PeopleReady for information regarding Ward's qualifications. Nor was it inconsistent for PeopleReady and its insurance carrier to enter into a settlement agreement with Ward for his injuries. The sole issue before the Commission, and now on appeal, is whether Ward was a dual employee of PeopleReady and Commerce on the day of the injury. He was. This court has held that an employer is only required to prove the existence of a workers' compensation insurance policy for the exclusive remedy to apply. *Pineda v. Manpower Int'l, Inc.*, 2017 Ark. App. 350, at 11, 523 S.W.3d 384, 391. Commerce did that. The employer is not required to prove that the employee was actually covered under that policy. *Id*, 523 S.W.3d at 391.

Affirmed.

HARRISON, C.J., and MURPHY, J., agree.

Tim Cullen; *Daniels Law Firm, PLLC*, by: *Shawn Daniels*; and *Hatfield Law Firm*, by: *Jason Hatfield*, for appellant.

Barber Law Firm, by: *Karen H. McKinney* and *Lauren A. Spencer*, for appellees.

[2]The record contains evidence that Commerce also has workers' compensation insurance through Cincinnati Insurance Companies for the employees it hires directly.