IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

AMERICAN LEGION MCCLELLAN PARSON POST 9, *Petitioner Employer*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

JENILYN LABAKIS, *Respondent Employee*,

SPECIAL FUND DIVISION/NO INSURANCE SECTION, *Respondent Party in Interest*.

No. 1 CA-IC 17-0075
FILED 10-23-2018

Special Action - Industrial Commission

ICA Claim No. 20170-060479
Carrier Claim No. None
Rachel C. Morgan, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Law Offices of Robert E. Wisniewski, Phoenix
By Robert E. Wisniewski
Counsel for Petitioner Employer

Industrial Commission of Arizona, Phoenix
By Gaetano J. Testini
Counsel for Respondent

Snow, Carpio & Weekley, PLC, Phoenix
By Dennis R. Kurth
Counsel for Respondent Employee

Special Fund Division/No Insurance Section
By Ashfan Peimani
Counsel for Respondent Party in Interest

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Kent E. Cattani joined.

M c M U R D I E, Judge:

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a compensable claim. One issue is presented on appeal: whether the administrative law judge ("ALJ") erred by finding that the respondent employee ("Claimant") was an employee of the petitioner employer, American Legion McClellan Parson Post 9 ("American Legion") at the time of her industrial injury. Because we conclude that the record on appeal supports the ALJ's award, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Claimant was working as a bartender at American Legion when she injured her back. She filed a workers' compensation claim, but American Legion did not have workers' compensation insurance, and her claim was referred to the respondent party in interest, Special Fund Division/No Insurance Section ("Fund"). The Fund accepted the claim for benefits, and American Legion timely protested and requested an ICA hearing.

¶3 The ICA subsequently held a hearing at which the parties' attorneys appeared and stipulated to facts instead of presenting witness testimony.[1] The facts established that Claimant was initially hired by the

[1] Parties to an ICA proceeding may stipulate to any fact or issue after a party files a request for hearing. *See* Ariz. Admin. Code R20-5-152.A.

post in 2006-07, as a bartender. She was paid by check with taxes withheld and a W-2 issued. She also received tips. Claimant's bartending duties included "replacing kegs of beer, ice, making drinks, cleaning up the bar, running the cash register, [and] serving food." The bar manager and the bartenders used a collaborative process of emails and texts to schedule work shifts for the bar.

¶4 In 2014, American Legion's commander gave the bartenders six weeks' notice that it would no longer employ them. After six weeks, American Legion "stopped paying wages, issuing paychecks, withholding or remitting social security and medicare taxes, withholding state or federal taxes and carrying workers' compensation insurance." Since that time, it has relied exclusively on "volunteer" bartenders.

¶5 At some point, Claimant quit working at American Legion for other jobs, but she returned to bartend again in 2015. The facts established that the bartending job remained the same, but the bartenders only earned tips. Claimant's position is that she would not have worked "for free," but because she earned $250 to $300 a week in tips, her remuneration was sufficient.

¶6 After the hearing, the parties filed simultaneous post-hearing memoranda, and the ALJ entered an award for a compensable claim finding an implied contract of hire between Claimant and American Legion. American Legion timely requested administrative review, but the ALJ summarily affirmed the award. American Legion next brought this appeal. This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2), 23-951(A), and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶7 "We defer to the ALJ's factual findings, because the ALJ is the sole judge of witness credibility, resolves all conflicts in the evidence, and draws all warranted inferences." *Ibarra v. Indus. Comm'n*, 245 Ariz. 174, ¶ 12 (App. 2018) (internal citations omitted). We review the ALJ's ruling concerning Claimant's employment status *de novo* as an issue of law. *Vance Int'l v. Indus. Comm'n*, 191 Ariz. 98, 100, ¶ 6 (App. 1998).

¶8 To be entitled to receive workers' compensation benefits, Claimant must have been an employee of American Legion at the time of the injury. *See* A.R.S. §§ 23-901(6)(b), -1021. To establish an employer-employee relationship, there must have been a contract of hire between the parties. *DeVall v. Indus. Comm'n*, 118 Ariz. 591, 592 (App. 1978); 5 Arthur

Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 64.01, at 64-2 to -4 (Matthew Bender ed. 2018). A contract of hire is an agreement to work for another for some type of payment. *See Vance Int'l*, 191 Ariz. at 100. A contract of hire may be express or it may be implied from the circumstances, such as acceptance of the employer's direction and control. *Ferrell v. Indus. Comm'n*, 79 Ariz. 278, 280–81 (1955).

¶9 A contract of hire does not exist when someone labors for another on a gratuitous basis. *Ferrell*, 79 Ariz. at 279. Payment, however, may consist of the provision of something of value other than wages or salary. *Id.*; Larson, *supra*, § 65.03 at 65-19 to -22. Further, it is not essential that the payment come from the employer. Larson, *supra*, § 65.01, at 65-2 to -3 (nurse paid by private foundation still hospital employee; caddy paid by club members still country club employee). When determining if a claimant is an employee or a volunteer, the focus is generally on whether the individual had the expectation of receiving payment for services rendered. *Henderson-Jones v. Indus. Comm'n*, 233 Ariz. 188, 192–93 (App. 2013).

¶10 In concluding that American Legion employed Claimant, the ALJ found:

> 5. While . . . the defendant employer may have exercised nominal control over the applicant, this finding is not dispositive [of] whether applicant is a volunteer. In following the law, the undersigned must determine whether a contract of hire existed. The undersigned finds that while the applicant was not paid wages she expected to receive all tips in return for her services; . . . I find that she did not provide her services as a bartender gratuitously and it is undisputed that applicant expected and received whatever tips were earned for her service. . . .
>
> 6. Thus, I find that an implied contract of hire did in fact exist between the defendant employer that applicant would bartend in exchange for the defendant employer allowing her to keep all tips generated as compensation for her services.

¶11 American Legion argues that there was no implied contract of hire because Claimant was under no obligation to work, and it did not provide her with any remuneration for her work. Although Claimant was under no obligation to work, the evidence established that she did work as many shifts as her regular job's schedule would allow. The stipulated facts and the email and text messages placed in evidence also establish that

American Legion's treatment of, and interaction with, its bartenders remained the same before and after 2014, when they stopped paying direct wages. *See Perry v. Indus. Comm'n*, 112 Ariz. 397, 398 (1975) (when reaching an award, the ALJ should consider all relevant evidence, both testamentary and documentary).

¶12 Regarding remuneration, American Legion did not pay wages, but it did give Claimant something of value by providing her with a place to bartend and to earn "considerable" customer tips. American Legion argues that customer tips do not constitute remuneration for services rendered, but the ALJ rejected this argument after considering the Arizona Supreme Court's opinion in *Senor T's Restaurant v. Industrial Commission*, 131 Ariz. 360 (1982). In *Senor T's*, the court addressed customer tips in the context of setting a waitress's average monthly wage. It recognized that "waiters, waitresses, [and] bartenders . . . in most instances receive a substantial portion of their earnings in the form of tips,"[2] and it concluded that tips should be included as wages for purposes of calculating a claimant's average monthly wage.[3] *Id.* at 363.

¶13 American Legion also argues that its actions refute any intent on its part to employ Claimant when she returned to bartend in 2015. Specifically, it asserts that it gave all bartenders notice that it considered them to be volunteers, and it quit issuing paychecks, withholding or remitting taxes, and carrying insurance.[4] This court has recognized that it is not the designation which the parties give to a relationship, but rather the objective nature of the relationship itself which is determinative. *See, e.g.*, *Anton v. Indus. Comm'n*, 141 Ariz. 566, 568–69 (App. 1984); *see also Molnar v. Indus. Comm'n*, 141 Ariz. 530, 532 (1984) (even when both parties agree to

---

[2] This is also recognized in the minimum wage law that allows a lower hourly wage for employees who regularly receive tips. *See* A.R.S. § 23-363(C). The legality of the American Legion not following the minimum wage law for its bartenders is not before us.

[3] Wages earned during the 30 days preceding an industrial injury. A.R.S. § 23-1041(G).

[4] American Legion also argues that Claimant acknowledged her volunteer status by completing and signing a volunteer form it submitted to the Arizona Department of Liquor Control. Although the record contains an "American Legion Post #9 Volunteer Record," it is not signed, and there is no indication of who filled it out.

change a claimant's status from employee to independent contractor, the court will still examine the underlying facts to determine the nature of the relationship). In this case, the appellate record contains sufficient evidence to support the ALJ's finding of an implied contract of hire between Claimant and American Legion.

CONCLUSION

¶14 For the foregoing reasons, we affirm the award.

AMY M. WOOD • Clerk of the Court
FILED: AA