IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

RANDY LEE JENKS,

Appellant,

v.

BYNUM TRANSPORT, INC. and ZENITH INSURANCE COMPANY,

Appellees.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-0628

Opinion filed December 17, 2012.

An appeal from an order of the Judge of Compensation Claims.
Margaret E. Sojourner, Judge.

Date of Accident: June 23, 2011.

Jason S. Robbins, Merritt Island, and Bill McCabe, Longwood, for Appellant.

William H. Rogner of Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A., Winter Park, for Appellees.

PER CURIAM.

In this workers' compensation case, Claimant appeals an order of the Judge of Compensation Claims (JCC) that denies compensability of his motor vehicle accident and resulting injuries on the basis that Claimant was not an employee at the time of the motor vehicle accident. Because we conclude that Claimant was an

"employee" as the term is defined in section 440.02(15)(a), Florida Statutes (2010), we reverse.

Background

On May 21, 2011, Claimant, a licensed truck driver, was contacted by Walt Ringdahl, a recruiter for the Employer[1], regarding a truck driving position. Mr. Ringdahl obtained Claimant's general information such as his name, address, date of birth, social security number, and work history. Thereafter, Mr. Ringdahl requested Claimant to attend the Employer's two-day orientation at the Employer's facility. Claimant delayed the orientation date for two to three weeks to provide adequate notice of his resignation to his (then) current employer. Claimant's orientation was scheduled for June 22 and 23, 2011.

On June 21, 2011, Claimant and his family traveled from Claimant's home in Mims, Florida, to Auburndale, Florida, to attend orientation. The Employer provided lodging, lunch, and transportation during the two-day orientation. On June 22, 2011, Claimant underwent a physical examination, which he successfully completed, and a drug test, the results of which were expected by the end of orientation. After Claimant signed for his picture identification badge, Mr. Ringdahl transported the recruits to and from lunch.

[1] Claimant had previously submitted an online application for employment to the Employer.

The same day, Claimant completed the Employer's checklist, titled "Prospective Bynum Drivers," which states, "This is not an offer of employment and should not be viewed as such"; Mr. Ringdahl instructed Claimant to date the checklist for the following day, June 23, 2011, the "official" date of hire. Claimant also signed a document titled "Orientation Pay" which stated that "all new drivers would receive $50 per day upon successful completion of orientation."

On June 23, 2011, Claimant received his picture identification badge. Because recruits were expected to depart from the Employer's facility for the first trip immediately following the second day of orientation, Claimant's wife delivered his provisions for the trip to the Employer's facility. Claimant got into his automobile with his wife to follow Mr. Ringdahl to the restaurant for lunch. On the way to lunch, Claimant was involved in a motor vehicle accident.

Thereafter, Claimant underwent a truck driving test, which he successfully completed. At the end of the second day of orientation, Claimant received the keys to his assigned truck and set out on his first trip. Although Claimant completed one trip for the Employer, he did not thereafter perform work.

On July 8, 2011, Claimant received a "Bynum Transport, Inc. Settlement Detail Sheet" which indicated that Claimant was paid "Orientation Pay" in the amount of $100 for Claimant's participation and completion of orientation. Under "Additional Wages," the document classified Claimant's orientation pay as "SAL."

The settlement sheet further listed Claimant's reimbursements for expenses, cash advances, deductions for supplies, and taxes witheld by the Employer.

On July 22, 2011, Claimant filed a petition for benefits (PFB) seeking compensability of the injuries sustained in the motor vehicle accident which occurred on the second day of orientation. The Employer/Carrier (E/C) denied the claim on the basis that Claimant was not an employee at the time of the accident. At the merits hearing, Claimant testified that it was his understanding that he was hired before he left for Auburndale because the Employer had completed the background investigation, knew who Claimant was, invited Claimant to travel to orientation, and covered his lodging expenses. Claimant also testified that he would not have left his previous employment of six years on a "maybe." Claimant further testified that he requested his trip "essentials" from his wife before the accident because he knew he was going to leave for his first trip following orientation. Claimant argued the $50 per-day orientation pay constituted wages and is evidence that Claimant's employment began June 22, 2011.

At trial, the E/C maintained that a contract for employment had not been formed with Claimant and offered testimony from Gary Brinkley, safety director for the Employer. Brinkley described Claimant's online application as an "internet inquiry" and testified that it was not an offer of employment. Mr. Brinkley testified that background information is collected during the online process, and

the Employer would not have invited Claimant to attend orientation or pay his lodging expenses if disqualifying information had been disclosed. Mr. Brinkley further testified that the Employer conducts weekly orientations and pays lodging and lunch expenses for prospective drivers because "most employees do not have money to pay for their facilities." He stated that prospective drivers are paid $50 per day upon successful completion of the two-day orientation as a starter fund intended to give new drivers money to start out with on the road. He acknowledged that Claimant received the money with his first pay check and not on the last day of orientation, but stated Claimant could have requested the money earlier if he needed it.

Regarding the hiring process, Mr. Brinkley testified that prospective drivers cannot become employees until orientation is completed. He stated the Employer uses the orientation process to complete any unfinished background investigations. He testified that Claimant would not have been hired if he had not passed the background investigation, physical examination, drug test, and driving test. He further testified that prospective drivers receive an identification badge when they have been officially hired and that Claimant was officially hired at the time he received his identification badge between 4:30 p.m. and 5:00 p.m. on June 23, 2011—approximately four hours after the automobile accident.

Mr. Brinkley testified that he handles all of the Employer's workers' compensation claims, and that workers' compensation benefits had been provided to other prospective drivers who had been injured during orientation.

In the final order, the JCC found that Claimant was not an employee at the time of his accident, and therefore the accident was not compensable. The JCC explained:

> The claimant was aware that he had to pass a drug test in order to be hired. He was told by Walt [Ringdahl] that he should not date the check list for the first day as he would not be hired until the second day. The claimant testified that he knew he could leave at any time and that several of the recruits did leave during or after the first day. He testified that he considered himself to be hired because he knew he could pass the drug test, physical examination and driver test. However, the employer did not know that claimant could pass these tests and did advise the claimant that he would not be hired until he successfully completed the orientation process. The claimant argues that the payment of the $50.00 per day was wages and is evidence that he had been hired. However, the paperwork he signed clearly indicates that these payments would not be made unless the orientation was successfully completed. Wages are defined as the money rate at which the service rendered is recompensed. It is undisputed that the monies paid for the first two days were a flat rate, different from the wage ultimately offered to and accepted by claimant. In addition the claimant would only receive this flat rate if he successfully completed the orientation. If he did not successfully complete the orientation he would not be given the flat rate. However, had he been working for those two days he would have been entitled to his wages for the time he was there, whether or not he successfully completed the orientation period.

Ultimately, the JCC found that because Claimant's physical, drug test, and driver's test "had not been completed or results received by the Employer," there

had not been an unequivocal offer of employment. Consequently, the JCC denied all claims for compensation under chapter 440, and dismissed all remaining petitions. This appeal followed.

Analysis

The status of an employment relationship can be determined as a matter of law. Phillips v. Unicare Amelia Island, Inc., 458 So. 2d 50, 52 (Fla. 1st DCA 1984) (citing Sosa v. Knight-Ridder Newspapers, Inc., 435 So. 2d 821, 826 (Fla.1983)). The issue presented here involves a legal issue of first impression: whether an individual injured during a mandatory orientation session is deemed an employee, such that he is subject to the Workers' Compensation Law. Although this court has established that former employees may be subject to the Law for injuries sustained after the contract of employment has terminated, it has not similarly addressed whether individuals undergoing training or orientation sessions mandated by an employer are covered. See Phillips, 458 So. 2d at 52 (holding former employee was employee as of date of her accident despite fact that she had quit work two weeks before she was injured, where her supervisor stated that date she picked up her check and was injured was earliest date available for her to pick up her paycheck) (citing 1A Arthur Larson, The Law of Workmen's Compensation, § 26.03[1]) (stating that course and scope extends to collecting pay, unless undue delay is shown).

Section 440.02(15)(a), Florida Statutes (2010), defines "employee" as:

> . . . any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written. . .

This broad language reflects the intent of the Legislature to afford expansive coverage under the Florida workers' compensation scheme, subject only to narrow exceptions. Hazealeferiou v. Labor Ready, 947 So. 2d 599, 604 (Fla. 1st DCA 2007).

The general rule is that there is no entitlement to workers' compensation benefits before hiring. 1A Arthur Larson, The Law of Workmen's Compensation § 26.02 (2012). Florida law requires that for a person to be considered an employee for workers' compensation purposes, a contract of employment, either express or implied, must exist. Jurisdictions that permit a conclusion that injuries sustained during a period of pre-employment are compensable base such a conclusion on the fact that in such jurisdictions, a formal employment contract is not necessary to establish an employment relationship covered by workers' compensation. Dodson v. Workers' Comp. Div., 558 S.E.2d 635 (W.Va. 2001). Claimant argues this court should adopt the holding of the Tennessee Supreme Court in Hubble v. Dyer Nursing Home, 188 S.W. 3d 525, 528 (Tenn. 2006). In Hubble, a claimant required to attend a three-day orientation session before reporting to work as a nursing home hostess was injured in an automobile accident

while driving to the orientation facility on the third day. Id. at 530. The employer asserted the claimant was not an "employee" because a prospective hostess was not allowed to work at the nursing home until the three-day orientation was completed and therefore could not be an employee until he or she actually came to work at the nursing home. Id. The Hubble court found the claimant was an "employee" for compensation purposes where the claimant was required to attend the orientation session prior to starting the position, the claimant was to be paid for attending the orientation, and orientation was not part of the application process in the way that a test or physical examination would be part of the application process. Id. at 533.

Here, it is undisputed that a formal, written contract of employment had not been created at the time of Claimant's motor vehicle accident. Notwithstanding, under the rationale employed by the Hubble court, Claimant would be deemed an "employee" retroactively to the first day of orientation, such that Claimant is subject to the Workers' Compensation Law, considering the following: Claimant was required to attend orientation prior to starting the first assignment as a truck driver; the Employer provided travel pay for lodging expenses incurred during the two-day orientation period; the Employer exerted control during the two-day orientation period, evidenced by its commandeering of Claimant's transportation throughout the orientation period (the Employer's representative transported Claimant to and from the Employer's facility throughout the orientation period);

the orientation was not part of the application process and took place upon completion of the application process; and significantly, according to the E/C's payroll records, Claimant was paid a salary for attending orientation. Additionally, evidence established that this Employer had covered injuries of those individuals who were undergoing the same type of orientation that occasioned Claimant's injuries—meaning the Employer was not of the mindset that absolutely no employer/employee relationship was being forged through the compensated activities of orientation. That the Employer—after the fact—characterized the salary Claimant received for orientation time as an advance and not really wages, is of no import; the Employer could have issued Claimant a different form of payment for his orientation time, but elected to pay Claimant wages for attending orientation instead—further indicating that the Employer was of the mindset that some form of employer/employee relationship was being forged through the activities of orientation.

Because the written documentation created by the Employer indicates that—consistent with Claimant's own understanding of his relationship with the Employer—Claimant was hired as of the first day of orientation by operation of salary paid for attending orientation, Claimant was an "employee" for workers' compensation purposes at the time of the motor vehicle accident. Accordingly, the

order on appeal should be REVERSED and REMANDED for entry of an order consistent with this opinion.

PADOVANO and CLARK, JJ., CONCUR; and THOMAS, J., DISSENTS WITH OPINION.

THOMAS, J., DISSENTING.

I respectfully dissent.

Coverage under the Florida Workers' Compensation Law is predicated on the existence of an employment contract, whether oral or written, express or implied. See § 440.02(15)(a), Fla. Stat. (2010) (defining employee as person who receives remuneration under employment contract, whether express or implied, oral or written); see also § 440.09(1), Fla. Stat. (2010) (providing that employer is required to secure compensation for employees). The Legislature has drawn the textual boundaries of coverage under the Workers' Compensation Law and, under its plain language, the existence of an employment contract is required. Notwithstanding the innumerable factual circumstances that might give rise to an employment contract, it is fundamental that all contracts -- even implied contracts created by conduct alone -- are governed by legal principles, require necessary evidentiary showings (with relevant burdens of persuasion inhering therein), and are ultimately governed by an appropriate standard of appellate review.

The majority, having been presented with a case where it is conceivable that an employment contract was formed -- had the evidence been accepted by the JCC -- has incorrectly interpreted the legal elements necessary to prove the existence of a contract.

In so doing, the majority has overlooked the role of the JCC as the finder of

fact, and this court's limited role on appeal to review such findings for competent, substantial evidence. As explained below, in my view, the only conceivable employment contract that was entered into between Claimant and Employer before the accident in question was an implied-in-fact contract, because the existence of neither an express contract nor a contract implied in law can be established on this record. Here, the existence of an implied-in-fact contract, and its terms, is dependent on evidentiary proof and factual findings; however, the facts that might have established an implied-in-fact contract were resolved against Claimant. Accordingly, we should affirm the order on appeal.

No Express Contract

An express contract is an actual agreement between the parties, the terms of which are openly uttered or declared at the time of formation. See Rabon v. Inn of Lake City, Inc., 693 So. 2d 1126, 1131 (Fla. 1st DCA 1997). The formation of a contract "depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing." Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp., 302 So. 2d 404, 407 (Fla. 1974) (quoting Gendzier v. Bielecki, 97 So. 2d 604, 608 (Fla. 1957)). Here, the majority does not set forth an express employment contract that might have been formed at the time of Claimant's automobile accident, or the terms of such an agreement -- nor would

the record support finding that an express employment contract had been reached before Claimant's automobile accident. Indeed, the agreement that Claimant signed pertaining to his pre-employment orientation contains an express provision that indicates Claimant had *not* been hired by Employer, stating it was "not an offer of employment and should not be viewed as such."

Thus, I must assume that the employment contract upon which the majority bases its result is not a written or express contract based on the actual words or promises of the parties, but rather an implied contract.

Significantly, however, the majority does not identify whether the implied contract upon which it bases its decision is a contract implied in fact -- a tacit promise made by Employer -- or an implied contract imposed by law -- a legal fiction that creates a contractual remedy where one party has been unjustly enriched by receiving something of value from the other party, in the absence of an express contract. See Rabon, 693 So. 2d at 1131 (explaining differences between express contract, implied-in-fact contract, and implied-in-law contract).

No Contract Implied by Law

"A contract implied by law is a legal fiction, an obligation created by the law without regard to the parties' expression of assent by their words and conduct." Am. Safety Ins. Serv., Inc. v. Griggs, 959 So. 2d 322, 331 (Fla. 5th DCA 2007) (quoting Commerce P'ship 8098 Ltd. P'ship v. Equity Contr. Co., 695 So. 2d 383,

386 (Fla. 4th DCA 1997) (citations omitted)); see also Rabon, 693 So. 2d at 1132 ("[I]t may be said obligations of this type should not be properly considered contracts at all, but a form of the remedy of restitution.") (citing to Restatement (Second) of Contracts § 4, cmt. b (1982)). The elements necessary to establish a contract implied by law (or a quasi-contract) are that: "(1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it." See Griggs, 959 So. 2d at 331 (quoting Commerce P'ship 8098 Ltd. P'ship v. Equity Contr. Co., 695 So. 2d 383, 386 (Fla. 4th DCA 1997) (citations omitted)). This record demonstrates that Claimant and Employer agreed that Claimant would be provided lodging and meals for attending the pre-employment orientation (a title that both expressly and implicitly bespeaks the non-existence of an employment relationship). By written agreement, Claimant would receive an additional $100 if, and only if, Claimant were thereafter hired by Employer.

At trial, Claimant did not establish, nor did he attempt to establish, that Employer was unjustly enriched by his attendance at the orientation, nor does Claimant aver as much in his briefs filed with this court. Importantly, the JCC did not find unjust enrichment, nor would the record support such a finding.

Accordingly, on this record, Claimant cannot establish an employment contract implied by law, and it is relatively clear that the majority's ruling does not rest on the existence of a contract implied by law. Hence, it is apparent that the majority, rather than relying on the terms of an express contract, or a contract implied by law, is concluding that an employment relationship was formed based on a contract implied in fact. As discussed below, however, because the record supports the JCC's finding that Employer never formed the intent to create any employment relationship with Claimant until after the orientation, we are required to affirm the appealed order. A contract implied in fact, just as an express contract, is dependent on a factual finding of mutual consent and agreement of the parties, which did not exist in this case.

No Contract Implied in Fact

A contract implied in fact requires the same elements as an express contract -- for relevant purposes here, a mutual intent to contract -- and differs only in the parties' method of expressing mutual consent. The United States Supreme Court has explained:

> An agreement implied in fact is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."

Hercules Inc. v. U.S., 516 U.S. 417, 423-24 (1996) (quoting Baltimore & Ohio R. Co. v. United States, 261 U.S. 592, 597 (1923)). This court has stated on

numerous occasions that a workers' compensation claimant bears the burden of proving entitlement to benefits. See Robinson v. Shands Teaching Hosp., 625 So. 2d 21, 23 (Fla. 1st DCA 1993) (explaining workers' compensation claimant has burden of proving entitlement to benefits denied by the employer). Here, this would require Claimant to prove the existence of an employment contract formed before his accident.

The Employer's representative testified that Employer had no intention of hiring Claimant until after the orientation program was complete, and further testified that Claimant was not hired until after the orientation program was completed and Claimant had met all pre-employment requirements. Claimant testified that he considered himself hired at the time of orientation because he knew he would pass the drug test and the physical; importantly, however, Claimant did not testify to any words or conduct of Employer indicative of a mutual agreement. The JCC found, in essence, that Claimant failed to prove a set of circumstances from which she could infer that the parties had entered into an employment contract before Claimant's accident. We have held that the party with the burden of persuasion must present evidence the JCC finds persuasive, and a decision in favor of the party without the burden of persuasion need not be supported by competent, substantial evidence. See Mitchell v. XO Commc'ns, 966 So. 2d 489, 490 (Fla. 1st DCA 2007); see also Fitzgerald v. Osceola County Sch.

Bd., 974 So. 2d 1161, 1163 (Fla. 1st DCA 2008) (stating decision in favor of party without burden of proof need not be supported by competent, substantial evidence).

Further, even if the Employer here bore the burden of demonstrating that the JCC's order should be affirmed, which it does not, the "standard of review in worker's compensation cases is whether competent, substantial evidence *supports* the decision below, *not* whether it is possible to recite contradictory record evidence which supported the arguments rejected below." Wintz v. Goodwill, 898 So. 2d 1089, 1093 (Fla. 1st DCA 2005) (quoting Mercy Hosp. v. Holmes, 679 So. 2d 860, 860 (Fla. 1st DCA 1996)) (emphasis in original). Because the record here supports the JCC's finding that Claimant failed to establish that an employment contract was formed before the accident occurred, and further, because the law supports a conclusion that Claimant's unilateral subjective beliefs about his employment status are insufficient to show a contract implied in fact, we should affirm. Although it is certainly worth noting that Claimant was paid money after completing the orientation session (which Claimant argues represents wages paid for attending the orientation session), this single fact is far from dispositive of the ultimate question presented in this case. This is especially true where the Employer's representative testified that this money was intended as startup money for new drivers, not as wages for work performed, and the JCC credited this

testimony as truthful. It is the party's employment status at the time of the accident that controls liability for workers' compensation purposes. See generally, Specialty Employee Leasing v. Davis, 737 So. 2d 1170, 1172 (Fla. 1st DCA 1999) (holding employee leasing company not responsible for workers' compensation coverage where there was no evidence establishing claimant was employee of leasing company at time of accident); Theis v. City of Miami, 564 So. 2d 117, 119 (Fla. 1990) ("The legal status at the time of injury should control.").

Thus, assuming that Employer improperly classified its payments to Claimant as wages, this would be but one fact indicating an intent other than that testified to by Employer, to be weighed by the JCC. Such payments would not, however, create a *de facto*, retroactive employment contract as a matter of law, where no such contract was formed by the mutual assent of the parties in real time. Based on the foregoing, therefore, I would affirm.