DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

INDUSTRIAL PERSONNEL, INC.*, Petitioner Employer, SCF ARIZONA, *, **, Petitioner Carrier, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, DHR INC. **MAHALO CO. *** dba AMERICAN BAR & RESTAURANT SUPPLY, MAHALO COMPANY*** c/o DANIEL MICHAEL HYUN, Respondent Employers, MICHAEL GLINIAK, Respondent Employee, SPECIAL FUND/NO INSURANCE SECTION ***, Respondent Party in Interest.	1 CA-IC 08-0047 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Special Action – Industrial Commission

ICA Claim Nos. 20062-270464*; 20063-250563**; and 20072-280452***

Carrier Claim Nos. 0631562*; 0652617**; and NONE***

Administrative Law Judge James B. Long

AWARD REGARDING TWO EMPLOYERS AFFIRMED;
AWARD REGARDING ONE EMPLOYER SET ASIDE

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G E M M I L L, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review in three consolidated claims, each against a different alleged employer. The Administrative Law Judge ("ALJ") found that respondent employee, Michael Gliniak, was employed by both the petitioner employer, Industrial Personnel, Inc., and the respondent employer, Mahalo Company, at the time of his industrial injury. The Special Fund Division/No Insurance Section is involved because Mahalo did not have its own workers' compensation insurance at the time of Gliniak's accident. The ALJ also found that Gliniak's

claim against DHR Inc. is non-compensable.

¶2 On appeal, Industrial Personnel contends that the ALJ erred in finding Industrial Personnel to be Gliniak's employer at the time of the accident. The specific issues raised by Industrial Personnel are:

> (1) whether the ALJ's findings lack the specificity necessary for appellate review; and
>
> (2) whether the ALJ erred by finding that Industrial Personnel was the claimant's employer at the time of his injury.

Additionally, Mahalo and the Special Fund Division seek affirmative relief on appeal and argue that the ALJ erred by finding that Mahalo also was Gliniak's employer at the time of his industrial injury. Gliniak urges us to affirm the award in its entirety.

¶3 We affirm the award of a non-compensable claim against DHR and we also affirm the award of a compensable claim against Mahalo and the Special Fund Division. We set aside the award of a compensable claim against Industrial Personnel.

ANALYSIS

¶4 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rules of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings but review questions of law de novo. *Young v Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in a light most favorable to

upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

BACKGROUND

¶5 On August 2, 2006, Gliniak was working as a laborer demolishing the inside of a building. While working, Gliniak slipped and fell, injuring his right knee. He filed workers' compensation claims against three potential employers, Industrial Personnel, Mahalo, and DHR. His claims were denied for benefits by the employers and their workers' compensation carriers. Gliniak timely requested a hearing against each one. The ALJ entered a consolidated notice of hearing, and in due course received testimony from Gliniak and several employer witnesses.

¶6 Following the hearing, the ALJ entered an award for a compensable claim against Mahalo and noncompensable claims against Industrial Personnel and DHR. Both the Special Fund Division and Mahalo requested administrative review, and the ALJ modified the award, concluding that Gliniak's claim against Industrial Personnel also was compensable. Industrial Personnel next brought this appeal, arguing that the award upon review finding Gliniak's claim compensable should be set aside. Mahalo also seeks affirmative relief on appeal, arguing that the ALJ erred in ruling that Mahalo was an employer required to have workers' compensation insurance and thereby ruling that it was an uninsured employer liable for workers' compensation benefits.

ANALYSIS

¶7 Industrial Personnel's first argument -- and the one we find dispositive -- is that the ALJ's findings and conclusions are insufficient under the standard set forth in *Post v. Industrial Commission*, 160 Ariz. 4, 770 P.2d 308 (1989), with respect to the award of a compensable claim against Industrial Personnel. *Post* requires administrative law judges to

> explicitly state their resolution of conflicting evidence on material and important issues, find the ultimate facts, and set forth their application of law to those facts.

160 Ariz. at 8, 770 P.2d at 312. Our supreme court amplified this point in *Douglas Auto v. Industrial Commission*, 202 Ariz. 345, 45 P.3d 342 (2002), stating that specific findings are preferred

> not only to encourage judges to consider their conclusions carefully, but also to permit meaningful judicial review. *Although findings need not be exhaustive, they cannot simply state conclusions.* Judges must make factual findings that are sufficiently comprehensive and explicit for a reviewing court to glean the basis for the judge's conclusions.

202 Ariz. at 347, ¶ 9, 45 P.3d at 344 (citations omitted) (emphasis added).

¶8 When the ALJ issued the award, he summarized the testimony presented and specifically found Gliniak and his supervisor Gary Falques credible.[1] He noted the applicable legal

[1] The ALJ is the sole judge of witness credibility, and it is his duty to resolve all evidentiary conflicts and to draw all warranted inferences. *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968).

test to determine the employment relationships between Gliniak and the three potential employers, based on the "lent employee" concept addressed in *Word v. Motorola, Inc.*, 135 Ariz. 517, 520, 662 P.2d 1024, 1027 (1983). And he made the following pertinent findings in the initial award (prior to administrative review):

> 14. The employment relationship of the applicant and Industrial Personnel and Mahalo is a classic "lent employee" situation. See Word v. Motorola, 135 Ariz. 517, 662 P.2d 1024 (1983). The facts establish that the work being done by the applicant was the work of the special employer, Mahalo, rather than that of the general employer Industrial Personnel. The facts establish that Mahalo through its supervisor, Falques, had the right to control the details of the work that the applicant was performing when he was injured. The applicant's consent to the employment relationship can be implied from his submission to Mahalo's direction and control. As the special employer, Mahalo is liable for worker[s'] compensation benefits. Labor Force v. Industrial Commission, 184 Ariz. 547, 911 P.2d 553 (App. 1995); Cf Avila v. Northrup King Company, 179 Ariz. 497, 880 P.2d 717 (App. 1994). The applicant[']s claim against Industrial Personnel is not compensable.

¶9 On administrative review, the Special Fund argued that the ALJ failed to apply the general versus special employer test correctly as to Industrial Personnel, thereby erroneously absolving it from liability. In response, the ALJ modified the Award by deleting the last sentence of Finding No. 14 and adding the following:

> However, when a labor contractor, such as Industrial Personnel, supplies or "lends" its employee to another employer, the result may be an arrangement in which one employee has two employers. Lindsey v. Bucyrus-Erie, 161

> Ariz. 457, 778 P.2d 1353 (App. 1989). The significance of this arrangement is that both employers are liable for workers' compensation. Araiza v. U.S. West Business Resources, Inc., 183 Ariz. 448, 904 P.2d 1272 (App. 1995). The claim against Industrial Personnel is compensable.

¶10 Accordingly, after the administrative review resulted in the ALJ's modification of the award, Finding No. 14 in its amended form provides:

> 14. The employment relationship of the applicant and Industrial Personnel and Mahalo is a classic "lent employee" situation. See Word v. Motorola, 135 Ariz. 517, 662 P.2d 1024 (1983). *The facts establish that the work being done by the applicant was the work of the special employer, Mahalo, rather than that of the general employer, Industrial Personnel.* The facts establish that Mahalo through its supervisor, Falques, had the right to control the details of the work that the applicant was performing when he was injured. The applicant's consent to the employment relationship can be implied from his submission to Mahalo's direction and control. As the special employer, Mahalo is liable for worker[s'] compensation benefits. Labor Force v. Industrial Commission, 184 Ariz. 547, 911 P.2d 553 (App. 1995); Cf Avila v. Northrup King Company, 179 Ariz. 497, 880 P.2d 717 (App. 1994). However, when a labor contractor, such as Industrial Personnel, supplies or "lends" its employee to another employer, the result may be an arrangement in which one employee has two employers. Lindsey v. Bucyrus-Erie, 161 Ariz. 457, 778 P.2d 1353 (App. 1989). The significance of this arrangement is that both employers are liable for workers' compensation. Araiza v. U.S. West Business Resources, Inc., 183 Ariz. 448, 904 P.2d 1272 (App. 1995). The claim against Industrial Personnel is compensable.

(Emphasis added.)

¶11 Under the lent employee doctrine, when a labor

contractor, as the general employer, lends an employee to another business, which then becomes the special employer, the result may be that the employee has two employers liable for workers' compensation benefits. *Araiza v. U.S. West Business Resources, Inc.*, 183 Ariz. 448, 452, 904 P.2d 1272, 1276 (App. 1995); A.R.S. § 23-1022(A) (1995). Under this doctrine, the presumption is that the general employer continues to be liable for benefits. *Word*, 135 Ariz. at 520, 662 P.2d at 1027; 3 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* ("*Larson*") § 67.03 at 67-7 (2008). The presumption may be overcome and liability shifted to, or shared by, the special employer if:

> (a) the employee has made a contract of 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.

Word, 135 Ariz. at 520, 662 P.2d at 1027; *see also Larson*, *supra* § 67, at 67-1.

¶12 If all three of the above conditions are satisfied as to both the general and the special employer, both employers share liability for payment of workers' compensation benefits. *Word*, 135 Ariz. at 520, 662 P.2d at 1027; *Labor Force v. Indus. Comm'n*, 184 Ariz. 547, 551, 911 P.2d 553, 557 (App. 1995). If all three prongs of this test are not satisfied with respect to the general employer, however, then the special employer will be the sole party responsible for workers' compensation coverage or benefits. This

court in *Labor Force* concluded that the special employer was exclusively responsible. 184 Ariz. at 553, 911 P.2d at 559.

¶13 Industrial Personnel contends that the ALJ's recitation of the applicable legal principle followed by the bare conclusion that it is liable to Gliniak for workers' compensation benefits is legally inadequate. It argues that the ALJ was required to apply the three-pronged test from *Word* by determining whether Industrial Personnel had a contract with Gliniak, whether Gliniak was performing work for Industrial Personnel at the time of his injury, and whether Industrial Personnel had a right to control Gliniak's work at the time of his injury. Industrial Personnel also points out that the ALJ's factual determination in Finding No. 14 -- that "the work being done by the applicant was the work of the special employer, Mahalo, rather than that of the general employer, Industrial Personnel" -- is inconsistent with a finding of compensability against Industrial Personnel.

¶14 We are persuaded that this award must be set aside with respect to Industrial Personnel. In the absence of further explanation, the specific finding -- "the work being done by the applicant was the work of the special employer, Mahalo, rather than that of the general employer, Industrial Personnel" -- supports a finding of non-compensability, rather than compensability, against Industrial Personnel. Additionally, because the ALJ did not make specific findings on the three-pronged test from *Word* regarding Industrial Personnel, we are unable to discern his factual findings

and review his application of the law to those facts. On this record and in accordance with *Post*, we believe we are compelled to set aside the award of a compensable claim against Industrial Personnel. We recognize that the ALJ may have made the required factual determinations and engaged in the appropriate legal analysis, but without additional explanation in the award we are unable to conduct an appropriate appellate review.

¶15 We next address the request for affirmative relief asserted by Mahalo and the Special Fund Division.[2] Mahalo does not challenge the ALJ's application of *Word*'s three-pronged test or his conclusion under this test that Mahalo satisfied the requirements as a special employer. Instead, Mahalo asserts that the ALJ erred by finding it was an employer required to have its own workers' compensation insurance. Maholo argues that leasing agencies such as Industrial Personnel provide payroll services for these workers and also provide workers' compensation insurance for them. Mahalo asserts that its contracts with leasing agencies such as Industrial Personnal require the agencies to provide workers' compensation coverage for the leased (or lent) employees; and Mahalo argues that because it conducts its business using employees obtained from such agencies, it need not purchase workers' compensation insurance.

¶16 Although we understand the logic of Mahalo's position that a business that operates with "lent" employees should not have

[2] Mahalo and the Special Fund Division will be referred to hereinafter simply as "Mahalo," unless the context requires otherwise.

to purchase workers compensation insurance because the employees are already covered by another insurance plan, it is not the parties' intentions that govern the legal result, but rather the application of Arizona law to the facts as found by the ALJ. *See Labor Force*, 184 Ariz. at 553-55, 911 P.2d at 559-61 (discussing whether ICA has jurisdiction to enforce a contract between employers allocating responsibility for workers' compensation coverage and observing that our statutes do not authorize such private allocations); *see generally Santiago v. Phoenix Newspapers, Inc.*, 164 Ariz. 505, 508, 794 P.2d 138, 141 (1990); *Anton v. Indus. Comm'n*, 141 Ariz. 566, 568, 688 P.2d 192, 194 (App. 1984) ("It is not the appellation which the parties give to the relationship, . . . but rather the objective nature of the relationship, determined upon an analysis of the totality of the facts and circumstances of each case, which is determinative."). The intentions of contracting parties such as Mahalo and Industrial Personnel cannot override or alter Arizona law and thereby relieve Mahalo of its obligations under the Arizona workers' compensation laws. *See generally* 11 Richard A. Lord, Williston on Contracts § 30.19 (4th ed. 2006) ("contractual language must be interpreted in light of existing law"); *Banner Health v. Med. Sav. Ins. Co.*, 216 Ariz. 146, 150, ¶ 15, 163 P.3d 1096, 1100 (App. 2007) (reiterating the rule in Arizona that a valid statute is automatically part of any contract affected by it). Furthermore, Mahalo has not directed our attention to any Arizona statutes authorizing an exception to the

requirement of coverage or self-insurance for employers who "borrow" employees from other employers. For these reasons, we reject Mahalo's argument that it should be allowed to contractually allocate responsibility for workers' compensation coverage to another employer.

¶17 Regarding DHR, the parties have not presented any colorable argument that the award of non-compensability in favor of DHR should be set aside. We will affirm this award.

¶18 Based on A.R.S. § 23-951(D) (1995), we ordinarily affirm or set aside an award in its entirety. Section 23-951(D) states that "[t]he court of appeals shall enter judgment either affirming or setting aside the award, order or decision." If a consolidated decision separately disposes of claims that are severable, however, "this court may severably dispose of them upon review." *Estate of Wesolowski v. Indus. Comm'n of Arizona*, 192 Ariz. 326, 332, ¶ 25, 965 P.2d 60, 66 (App. 1998) (citing *Prof'l Furniture Serv. v. Indus. Comm'n*, 133 Ariz. 206, 209, 650 P.2d 508, 511 (App. 1982)). Gliniak made claims against three employers, Mahalo, Industrial Personnel, and DHR. These claims were consolidated for hearing before the ALJ, and the ALJ issued a consolidated award, addressing each employer separately. In our judgment, the claims and the decisions regarding each employer are severable. Accordingly, we may separately address the decision of the ALJ regarding each employer without violating the mandate of A.R.S. § 23-951(D).

¶19 The evidence and the law support the ALJ's determination

that Gliniak is entitled to workers' compensation benefits from Mahalo and the Special Fund Division. It remains to be determined whether Industrial Personnel and its workers' compensation insurer will be liable, along with Mahalo and the Special Fund Division, for payment of the required benefits to or on behalf of Gliniak.

DISPOSITION

¶20 For these reasons, we affirm the award of a compensable claim for Gliniak against Mahalo and the Special Fund Division; we affirm the award of a non-compensable claim against DHR; and we set aside the award of a compensable claim against Industrial Personnel.

/s/
JOHN C. GEMMILL, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
DIANE M. JOHNSEN, Judge