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



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| JAMES ALLEN KAFER, dba KAFER PLUMBING COMPANY,<br><br>Petitioner Employer,<br><br>v.<br><br>THE INDUSTRIAL COMMISSION OF ARIZONA,<br><br>Respondent,<br><br>RANDY D. SHIVE & JANE DOE SHIVE, Individually and as husband and Wife,<br><br>Respondent Employer,<br><br>ISAIAH BELTRAN,<br><br>Respondent Employee,<br><br>SPECIAL FUND DIVISION/NO INSURANCE SECTION,<br><br>Respondent Party in Interest. | 1 CA-IC 09-0086<br><br>DEPARTMENT D<br><br>**MEMORANDUM DECISION**<br>(Not for Publication – Rule 28, ARCAP) |

Special Action—Industrial Commission

ICA CLAIM NO. 20083-360892

CARRIER CLAIM NO. None

Administrative Law Judge Deborah Nye

**AWARD AFFIRMED**

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**W I N T H R O P**, Presiding Judge

**¶1** This is a special action review of an Industrial Commission of Arizona ("the ICA") award and decision upon review awarding Isaiah Beltran ("Applicant") workers' compensation and disability benefits as an employee who was injured while working for James Allen Kafer, dba Kafer Plumbing Company ("Kafer"). On review, Kafer argues that the ICA erred in finding that Randy D. Shive ("Shive") was his employee and that Shive had the authority to hire Applicant on Kafer's behalf.

## FACTS AND PROCEDURAL BACKGROUND

**¶2** Kafer is a long-time contractor for Harrison Properties; providing both plumbing and evaporative cooler services for the properties it leases and manages. When requesting work to be performed on its evaporative coolers,

Harrison Properties places a service order with Kafer who, in turn, provides workers to perform the necessary tasks.

**¶3** In May, 2008, Kafer entered a contract with Shive allowing Shive to engage in work on behalf of Kafer.[1] The following evidence regarding their relationship was presented at the ICA hearing: that Shive claimed to work as an employee for Kafer; that Shive was authorized to purchase materials through Kafer's account; that Kafer alone submitted invoices, including Shive's work, to Harrison Properties; that Shive received payment for his work directly from Kafer; that Kafer "kept a 'premium'" for arranging work between Shive and Harrison Properties; and that Shive received all of his job instructions from Kafer. Harrison Properties never entered any agreements with Shive, nor did it directly pay Shive for his work.

**¶4** On September 26, 2008, Shive hired Applicant to assist him with his work on evaporative coolers.[2] Though Kafer was aware that Applicant was working with Shive, he never expressly authorized Shive's hiring of him. Applicant believed that he

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[1] Harrison Properties was not a party to this agreement. The contract stipulated that all work Shive received as a result of this agreement would be considered "subcontracted labor." The agreement also mandated that Shive would be responsible for filing his own taxes and that Shive expressly waived any workers' compensation claims against Kafer that may result from injuries occurring while working.

[2] Applicant never filled out any paperwork regarding his employment with Shive or Kafer.

was Kafer's employee, and that Shive was merely his supervisor. Several days after Applicant had been hired, he fell through a skylight while working on a Harrison Properties evaporative cooler and suffered severe physical injuries. Upon arriving at the hospital, Shive told the hospital staff that Applicant was injured while working for Kafer and that Kafer did not carry insurance.

**¶5** Shive visited Applicant in the hospital and paid him $100.00 in cash. Shive also unsuccessfully attempted to have Applicant sign forms purporting to release Kafer from liability. After that encounter, Kafer himself contacted Applicant and offered to pay for his medical expenses so long as Applicant did not take any legal action. After making that promise, Kafer wrote several checks to help cover the costs of Applicant's medical and rehabilitation bills. The checks were written by "KAFER MECHANICAL SERVICES[,] JAMES A. KAFER."

**¶6** At some point, Kafer refused to continue making payments to Applicant, so Applicant filed a claim for compensation with the ICA. Kafer contended that Applicant was not his employee. On September 14, 2009, following an evidentiary hearing, the administrative law judge ("the ALJ") made the following findings: that Applicant was seriously injured while fulfilling his job duties; that Shive took his work orders from Kafer; that conflicts in the evidence were

"resolved in favor of [Applicant's] witnesses"; that the preponderance of evidence proved that Shive was an employee of Kafer; that Applicant was hired by Shive, who was acting as an agent for Kafer; and therefore, that Applicant was an employee of Kafer. Accordingly, the ALJ awarded worker's compensation and disability benefits to Applicant. The award was affirmed by the ICA upon review.

**¶7** Kafer submitted a timely request for review. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(B)(2003) and 23-951 (1995).

**DISCUSSION**

**¶8** Kafer contends that the ALJ made two errors. First, Kafer argues that the ALJ erred in finding that Shive was his employee. Kafer then argues that even if the ALJ correctly determined that Shive was his employee, the ALJ erred in finding that Shive was authorized to act as an agent on his behalf, and therefore, Shive lacked the authority to hire Applicant on Kafer's behalf.

**¶9** An ALJ "is a fact finder and appellate courts are bound by those findings." *Ohlmaier v. Industrial Comm'n of Arizona*, 161 Ariz. 113, 117, 776 P.2d 791, 795 (1989) (citation omitted). Further, an award may be overturned only "if its conclusion cannot be reasonably supported on any reasonable theory of evidence . . . even if [the reviewing court] would

reach a different conclusion if sitting as the triers [sic] of fact." *Phelps v. Industrial Comm'n of Arizona*, 155 Ariz. 501, 506, 747 P.2d 1200, 1205 (1987).

**¶10** Though the contract between Shive and Kafer suggests that the parties had not formed an employment relationship, the terms of that contract are not determinative. *See Tarron v. Bowen Machine & Fabricating, Inc.*, 225 Ariz. 147, 152, ¶ 23, 235 P.3d 1030, 1035 (2010). We must also consider both the purported employer's "right-to-control" the employee and the "totality of the circumstances" to determine whether an employment relationship existed. *Mitchell v. Gamble*, 207 Ariz. 364, 368, ¶ 12, 86 P.3d 944, 948 (App. 2004); *see also Tarron*, 225 Ariz. at 152, ¶ 23, 235 P.3d at 1035 (stating that "[t]he trier of fact must examine the objective nature of the employment relationship when determining employment status").

**¶11** It is clear that the ALJ considered both Kafer's ability to control Shive and the totality of the circumstances in deciding that Shive was an employee of Kafer. In reaching her decision, the ALJ relied on the evidence showing that Kafer hired Shive and both dictated and supervised his work; that Kafer significantly benefitted from Shive's work; and that the relationship between the parties was otherwise similar to an employment relationship. The record supports the findings of the ALJ that Shive was Kafer's employee.

**¶12** Kafer also argues that he cannot be considered an employer under A.R.S. § 23-902(B) (Supp. 2009). That statute provides:

> B. When an employer procures work to be done for the employer by a contractor over whose work the employer retains supervision or control, and the work is a part or process in the trade or business of the employer, then the contractors and the contractor's employees, and any subcontractor and the subcontractor's employees, are, within the meaning of this section, employees of the original employer. For the purposes of this subsection, "part or process in the trade or business of the employer" means a particular work activity that in the context of an ongoing and integral business process is regular, ordinary or routine in the operation of the business or is routinely done through the business' own employees.

A.R.S. § 23-902(B). Kafer first argues that contractors like Shive may only be considered employees under this section. Further, Kafer argues that because he operates a plumbing business, Shive's sub-contracted work on evaporative coolers was not "part or process" of his business, and therefore, Shive was not his employee under A.R.S. § 23-902(B).

**¶13** Even assuming that the ALJ only found Shive to be an employee pursuant to A.R.S. § 23-902(B), we find no error with the ALJ's decision. Though Kafer's company is named "Kafer Plumbing Company," the record clearly shows that it regularly engaged in work on evaporative coolers for Harrison Properties

as “part or process” of its business. The representative of Harrison Properties testified that it “assigned” all plumbing and evaporative cooler work to Kafer. All of Shive’s work was billed to Harrison Properties through Kafer’s company. Shive was authorized to purchase supplies using Kafer’s business account. Though Shive no longer works with Kafer, Kafer Plumbing continues to provide evaporative cooler services and workers to meet the needs of Harrison Properties. Accordingly, the record supports a finding that Shive’s work was “part or process” of Kafer’s business and that Shive was an employee of Kafer pursuant to A.R.S. § 23-902(B).

**¶14** Kafer also argues that even if Shive was his employee, Shive was not authorized to act as an agent to hire Applicant to work for him. “Agency is a question of fact to be determined by the jury or other trier of facts unless no competent evidence legally sufficient to prove it has been introduced . . . .” *Schenks v. Earnhardt Ford Sales Co.*, 9 Ariz. App. 555, 557, 454 P.2d 873, 875 (App. 1969). There are four methods through which the formation of an agency relationship may be proven: 1) an express agreement; 2) implied agreement; 3) ratification; 4) estoppel. *See Land-Air, Inc. v. Parker*, 103 Ariz. 1, 2, 435 P.2d 838, 840 (1967). In determining that Shive hired Applicant as an agent of Kafer, the ALJ relied on evidence showing that Applicant was providing integral services for the benefit of

Kafer. Further, Kafer admitted that he was aware that Applicant was assisting Shive in the evaporative cooler work, and made no objection to the arrangement.[3] Applicant also testified that he believed that he was employed by Kafer, not by Shive, and the ALJ found Applicant's testimony to be credible. Sufficient evidence was presented to support a finding that either an implied agency or agency via ratification existed between Kafer and Shive. Accordingly, the ALJ did not err in finding that Shive was authorized to hire Applicant on Kafer's behalf.

**CONCLUSION**

**¶15** For all of the foregoing reasons the award and decision upon review are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

_____/S/_____
PATRICIA K. NORRIS, Judge

_____/S/_____
PATRICK IRVINE, Judge

[3] In fact, evidence was presented that reported that Kafer was both aware of and pleased with Applicant's work with Shive.