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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/19/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARIZONA HORSEMEN'S ASSOCIATION,) No. 1 CA-IC 10-0032
)
Petitioner,) DEPARTMENT B
)
TRAVELERS INDEMNITY COMPANY,) **MEMORANDUM DECISION**
)
Petitioner Carrier,) (Not for Publication -
) Rule 28, Arizona Rules
v.) of Civil Appellate
) Procedure)
THE INDUSTRIAL COMMISSION OF ARIZONA,)
)
Respondent,)
)
ROSA HERNANDEZ,)
)
Respondent Employee,)
)
PEDRO HERNANDEZ SANDOVAL RACING,)
)
Respondent Employer,)
)
SPECIAL FUND DIVISION/NO INSURANCE)
SECTION,)
)
Respondent Party in Interest.)
_____)

Special Action - Industrial Commission

ICA Claim No. 20090-5000338,
20090-410040 (Consolidated)

Carrier Claim No. None

The Honorable Joseph L. Moore, Administrative Law Judge

AWARD REVERSED AND REMANDED

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K E S S L E R, Presiding Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review which found that respondent employee Rosa Hernandez ("Hernandez") was insured under a workers' compensation insurance policy issued to the petitioner, the Arizona Horsemen's Association ("AHA"). For the reasons stated below, we reverse the award and remand the matter to the ICA.

FACTUAL AND PROCEDURAL HISTORY

¶2 In December 2008, Sandoval Racing, through Pedro Sandoval ("Sandoval"), hired Hernandez to work as a horse groomer at Turf Paradise. The day after her hire, a horse kicked Hernandez, fracturing her right arm. She filed a

workers' compensation insurance claim; however, Sandoval Racing did not have workers' compensation insurance.¹ The Special Fund denied the claim.

¶3 Hernandez timely protested the denial of her claim.² At the evidentiary hearing before the ALJ, Hernandez testified that Sandoval and his brother, Sergio, supervised her work, provided the necessary equipment, and agreed to pay her \$450 per week. She also testified that when she reported her injury to Sandoval, he told her that he insured only Sergio and had no insurance for her injury. At the time of her injury, she had never heard of AHA.

¶4 Ricki Hinrichs administers AHA. Hinrichs described AHA as a non-profit organization "made up of horsemen to help horsemen" navigate the business aspect of horseracing, such as payroll and providing workers' compensation insurance, which Turf Paradise requires of the trainers using its stalls. AHA members provide AHA with the money for the members' employees' paychecks and AHA then gives the money to a payroll service that issues the employees' checks. AHA charges members \$15 per

¹ Accordingly, if Hernandez was considered an employee of Sandoval Racing, respondent party in interest Special Fund Division/No Insurance Section ("Special Fund") would be responsible for paying any workers' compensation benefits to Hernandez. Ariz. Rev. Stat. ("A.R.S.") § 23-907(B) (Supp. 2010).

² Pursuant to the record, there were two ICA claim numbers, which have been consolidated.

paycheck for this service. AHA did not supervise its member trainers or their employees, and it did not provide any tools or equipment. Hinrichs testified that AHA has no office at Turf Paradise and she handles AHA's programs out of her home.

¶15 AHA also provides an H2-B visa enrollment program. The H2-B program is a federal temporary-work program designed to allow foreign, nonagricultural workers to work legally in the United States. Federal law requires AHA to distribute regular paychecks to workers enrolled in the H2-B program, pay minimum wage, and pay workers' compensation insurance. AHA obtained workers' compensation insurance coverage from the petitioner carrier, Travelers Indemnity Company ("Travelers").

¶16 Hinrichs testified that any trainer could join AHA to utilize its services for that trainer's employees. To enroll an employee, a trainer must complete AHA's required paperwork and provide necessary documentation; then, the trainer's employees become AHA's employees for purposes of the H2-B program. Hinrichs testified that she had assisted Sandoval in signing up two employees for the H2-B program, but Sandoval had not enrolled Hernandez. Hinrichs had no knowledge of Hernandez's employment with Sandoval Racing until after the injury.

¶17 Hinrichs testified that she made no effort to determine who AHA's members employ or whether those employees

are legally in the United States. She stated that she does not go to Turf Paradise and she has an employee deliver the AHA paychecks. However, it is unclear from the record how Hernandez would have been paid her wages.

¶18 The ALJ entered an award adopting the Special Fund's position that Hernandez was entitled to coverage under AHA's workers' compensation policy. AHA timely requested administrative review, and the ALJ supplemented and affirmed the Award. AHA timely appealed.

JURISDICTION AND STANDARD OF REVIEW

¶19 This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) (2003), 23-951(A) (1995), and Rule 10 of the Arizona Rules of Procedure for Special Actions. 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 of Ariz.*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). The ALJ's conclusion whether an employer-employee relationship exists is an issue of law we review *de novo*. *Vance Int'l v. Indus. Comm'n of Ariz.*, 191 Ariz. 98, 100, ¶ 6, 952 P.2d 336, 338 (App. 1998). We consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n of Ariz.*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

DISCUSSION

¶10 The result in this case turns on whether an implied contract of employment existed between Hernandez and AHA for purposes of workers' compensation insurance coverage. We hold that no such implied contract existed. Accordingly, AHA was not Hernandez's employer and the Special Fund, not AHA and its insurer, is liable for the benefits at issue.

¶11 To be entitled to workers' compensation insurance benefits under the Arizona Workers' Compensation Act, a worker must have been an employee of an employer subject to the act at the time of the injury. See A.R.S. §§ 23-901(6)(b), -1021(A) (Supp. 2010). There must be a contract of hire for an employer-employee relationship to exist. See A.R.S. § 23-902(A) (Supp. 2010) (a person is an employer if she employs "workers or operatives regularly employed in the same business or establishment under contract of hire"). The contract of employment can be express or implied. *DeVall v. Indus. Comm'n of Ariz.*, 118 Ariz. 591, 592, 578 P.2d 1020, 1021 (App. 1978).

¶12 To have a contract of hire, there must be "by mutual consent an express or implied contract" between the putative employer and employee. *Vance*, 191 Ariz. at 100, ¶ 9, 952 P.2d at 338. To determine if there was a hire in the absence of an express agreement, we look to whether the putative employer was

paying the employee and whether the nature of the work was part of the "usual trade, business, profession or occupation" of the employer. *Id.* Moreover, while we will also look to whether the putative employer "controlled" the activities of the employee, no amount of control is sufficient without a contract of hire. *Id.* at 100-01, ¶¶ 11-12, 952 P.2d at 338-39.

¶13 Here, because Sandoval Racing did not enroll Hernandez in the H2-B program or any other services offered by AHA, there is no express or implied contract of hire between AHA and Hernandez. Nor is there evidence AHA controlled Hernandez's work, that it would or could control Hernandez's duties, or that grooming was AHA's usual trade or business. Rather, upon application by a trainer, AHA's role was to accommodate and assist trainers in navigating the business aspect of horseracing, including providing workers' compensation insurance for enrolled employees. Additionally, AHA assisted trainers in obtaining work visas for trainers' employees when needed. AHA had no authority to require trainers to become members, no authority to dictate which employees the member trainers enrolled in the program, and no authority over its members or their employees' work duties.

¶14 As such, this case is most similar to *Cooper v. Industrial Commission of Arizona*, 74 Ariz. 351, 249 P.2d 142

(1952). In *Cooper*, the president and sole owner of a farming company hired the claimant for carpentry work on the president's personal residence. *Id.* at 352, 249 P.2d at 142. The claimant was an employee of the company and on its payroll. *Id.* However, that arrangement was merely "for the accommodation" of the president; the company charged his personal account to reimburse paychecks made out to the claimant. *Id.* at 352, 249 P.2d at 143. The Arizona Supreme Court affirmed the commission's award, finding that the claimant was not an employee of the company. *Id.* at 354, 249 P.2d at 144. Here, AHA's role was the same as the company's role in *Cooper*. Sandoval Racing never enrolled Hernandez in AHA's program; therefore, AHA was not Hernandez's employer.

¶15 The Special Fund argues that it is of no consequence that no contract of hire existed between Hernandez and AHA because AHA volunteered to insure all employees of its members. However, the Special Fund fails to provide evidentiary support and develop an argument to show that AHA volunteered to insure employees of its members who did not enroll the employees in AHA's program.

¶16 The Special Fund, citing *West Chandler Farms Company v. Industrial Commission of Arizona*, 64 Ariz. 383, 173 P.2d 84 (1946), also argues that once AHA expressly insured some of

Sandoval Racing's employees, by operation of law, it insured all of Sandoval Racing's employees. It relies on A.R.S. § 23-963, which provides that "[e]very policy of insurance covering the liability of the employer for workers' compensation . . . shall cover the entire liability of the employer to his employees covered by the policy or contract." The Special Fund argues AHA "could not pick and choose" which of the members' employees would be covered because the policy was a "direct" policy of insurance covering all AHA members and their employees without the necessity of individually listing covered employees.

¶17 The Special Fund's argument begs the question: the basis of its argument assumes that Hernandez was an employee of AHA. This case is unlike *West Chandler Farms*, in which the Arizona Supreme Court held that an employer must insure all employees of the business or occupation covered and cannot pick and choose which employees it insures within a specific occupation. 64 Ariz. at 390-91, 173 P.2d at 89. However, in *West Chandler Farms*, the court found there was an implied contract of hire because the putative employer supervised and controlled the claimant's work. *Id.* at 388, 173 P.2d at 87. Because there was no contract of hire between AHA and Hernandez, she was not an employee of AHA and not covered by AHA's workers' compensation insurance policy. Sandoval Racing's failure to

enroll Hernandez into the AHA program does not magically transform AHA into Hernandez's employer.

¶18 Finally, the Special Fund argues that Hernandez's immigration status cannot affect her eligibility for workers' compensation insurance.³ This argument has no bearing on the issue before us because AHA did not contend Hernandez's immigration status precluded her from being its employee for purposes of workers' compensation insurance coverage.

CONCLUSION

¶19 For all of the foregoing reasons, we reverse and remand the award to the ICA for further proceedings consistent with this decision.⁴

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Judge

/s/
SHELDON H. WEISBERG, Judge

³ Hernandez testified that she did not have a permit to work in the United States.

⁴ In the Decision Upon Review, the ALJ *sua sponte* raised the issue of statutory employment pursuant to A.R.S. § 23-902(B). Neither party argues the applicability of this doctrine on appeal. Accordingly, the parties waived consideration of this issue.