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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JUDSON D. FORKS, a single man, Appellant, v. ENCON WASHINGTON LLC, a Washington limited liability company and subsidiary of EnCon Companies, Respondent.	No. 48852-3-II UNPUBLISHED OPINION

MELNICK, J. — In the course of his employment with Aerotek, a staffing agency, Judson D. Forks was injured while working on a jobsite for EnCon Washington, LLC. Forks sued EnCon for negligence. The trial court summarily dismissed the complaint, relying on the Industrial Insurance Act's (IIA)[1] bar of suits by employees against employers for negligence. Forks appeals the summary judgment dismissal, alleging (1) he was not EnCon's employee and (2) his contract with Aerotek did not waive his right to bring a negligence claim against EnCon. Finding no error in the trial court's dismissal, we affirm.

FACTS

EnCon is a manufacturer of precast concrete components for construction projects. EnCon contracted to fabricate and deliver precast tunnel liners for the State Route (SR) 99 Bored Tunnel Project in Seattle. Needing additional laborers for the project, EnCon contracted with Aerotek, to provide the needed workers.

[1] Title 51 RCW.

Under the agreement between EnCon and Aerotek, Aerotek agreed to provide "to [EnCon] one or more Contract Employees as requested by [EnCon] from time to time. Such Contract Employees shall provide services under [EnCon's] management and supervision at a facility or in an environment controlled by [EnCon]." Clerk's Papers (CP) at 48. Additionally, the agreement provided, "It shall be [EnCon's] responsibility to control, manage and supervise the work of the Contract Employees assigned to [EnCon] pursuant to this Agreement." CP at 48. In return, EnCon paid to Aerotek the contract employee's wages plus a 1.5 percent mark up to cover workers' compensation premiums and other benefits.

Forks was one of the contract employees assigned to EnCon under the agreement. Forks signed a two-page policies and procedures statement with Aerotek. Regarding on the job injuries, paragraph 14 of the statement states that Forks agrees "for Workers' Compensation purposes only, I will be considered an employee of Aerotek's client [EnCon], and that workers' compensation benefits are my exclusive remedy with respect to any injury I incur while on assignment." CP at 71. Also in paragraph 14, Forks agreed,

> In furtherance of the foregoing and in recognition that any work related injuries which might be sustained by you are covered by state Workers' Compensation statutes, and to avoid the circumvention of such state statutes, which may result from suits against the Clients of Aerotek based on the same injury or injuries, and to the extent permitted by law, YOU HEREBY WAIVE AND FOREVER RELEASE ANY RIGHTS YOU MIGHT HAVE to make claims or bring suit against the Client of Aerotek for damages based upon injuries which are covered under such Workers' Compensation statutes.

CP at 71.

While working at EnCon, Forks injured his shoulder when he reached up to brace a tilting rebar jig being lifted by a forklift. Two rebar pins allegedly broke, causing the rebar jig to tilt. Forks reported the incident to his supervisor at EnCon and EnCon's safety coordinator. Forks ultimately needed surgery on his shoulder. He did not return to EnCon after the incident.

Forks filed a workers' compensation claim, which the Department of Labor and Industries approved. Forks then filed a negligence complaint against EnCon. EnCon moved for summary judgment, arguing it was immune from liability under the IIA. The trial court granted EnCon's motion and dismissed Forks negligence complaint. Forks appeals.

ANALYSIS

We review summary judgment orders de novo, considering the evidence and all its reasonable inferences in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). "Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007); CR 56(c). There is no genuine issue of material fact if reasonable minds could reach only one conclusion from the evidence presented. *Bostain*, 159 Wn.2d at 708.

I. EMPLOYEE-EMPLOYER RELATIONSHIP

Forks first argues EnCon is not immune from liability under the IIA because Forks did not have an employee-employer relationship with EnCon. We disagree.

The IIA grants immunity to employers from civil suits initiated by their workers for nonintentional workplace injuries and provides workers with a compensation system for injuries on the job. RCW 51.04.010; *Dep't of Labor & Indus. v. Lyons Enters. Inc.*, 185 Wn.2d 721, 733, 374 P.3d 1097 (2016). Although no statute specifically defines when an employment relationship exists within the meaning of the IIA, in making such determinations, courts have consistently applied the two-part test articulated in *Novenson v. Spokane Culvert & Fabricating Co*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979). *Bennerstrom v. Dep't of Labor & Indus*., 120 Wn. App. 853, 856, 856 n.1, 86 P.3d 826 (2004). The test states that "an employment relationship exists only

when: (1) the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship." *Novenson*, 91 Wn.2d at 553. Forks does not dispute that EnCon had the right to control his conduct. At issue is whether Forks consented to an employment relationship.

Consent may be given expressly or impliedly and may be inferred from the attending circumstances. *Fisher v. City of Seattle*, 62 Wn.2d 800, 806, 384 P.2d 852 (1963). An employment relationship requires "mutual agreement" between the employer and the employee. *Jackson v. Harvey*, 72 Wn. App. 507, 515-16, 864 P.2d 975 (1994). A worker's bare assertion of belief that he or she did not work for a particular employer is not sufficient. *Jackson*, 72 Wn. App. at 519.

In *Jaimes v. NDTS Constr., Inc.*, 195 Wn. App. 1, 3, 381 P.3d 67 (2016), Jaimes, a day laborer who always received cash for his work, received injuries while working on a construction site. He sued several companies, including Superior Floors, for negligence. *Jaimes*, 195 Wn. App. at 5. Superior Floors claimed immunity from liability because it employed Jaimes. *Jaimes*, 195 Wn. App. at 5. The trial court agreed and granted Superior Floors' motion for summary judgment. *Jaimes*, 195 Wn. App. at 5. The court of appeals reversed, holding there was a genuine issue of material fact as to whether Jaimes consented to an employee-employer relationship with Superior Floors. *Jaimes*, 195 Wn. App. at 8-9. The court relied on the fact Jaimes never heard of Superior Floors until litigation began, he never received a paycheck or anything else in writing from Superior Floors, the company that hired him never informed Jaimes before the accident that Superior Floors was his employer, and it did not appear that Superior Floors kept Jaimes, or any other temporary day laborer, on its books as an employee. *Jaimes*, 195 Wn. App. at 7.

Here, unlike in *Jaimes*, Encon contracted with Aerotek for employees. In the two companies' contract it stated that workers would be EnCon's contract employees and that, "It shall

be [EnCon's] responsibility to control, manage and supervise the work of the Contract Employees." CP at 48. EnCon also paid Forks's wages, plus a 1.5 percent markup for workers' compensation and other benefits, to Aerotek to be distributed to Forks. Additionally, Forks stated in his deposition that he reported his injury to his supervisor and the safety coordinator, both EnCon employees. Lastly, Forks's contract expressly stated that he would "be considered an employee of Aerotek's client [EnCon]" for worker's compensation purposes. CP at 71. Based on these facts, reasonable minds could reach only one conclusion that there was mutual agreement, both express and implied, to an employment relationship between Forks and EnCon. Forks's claim that Aerotek was his sole employer is a bare assertion that does not create a genuine issue of material fact to defeat the summary judgment motion. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

Accordingly, EnCon is immune from liability for Forks's injuries under RCW 51.04.010. The trial court properly dismissed Forks's negligence complaint.

II. WAIVER

Forks next argues that the language in the policies and procedures statement that he signed, stating "YOU HEREBY WAIVE AND FOREVER RELEASE ANY RIGHTS YOU MAY HAVE to make claims or bring suit against the Client of Aerotek [EnCon] for damages based upon injuries which are covered under such Workers' Compensation statutes" was not a valid waiver. CP at 71. Based on our holding that EnCon is immune from liability, we need not reach Forks's argument that he did not waive his right to file a negligence claim. Whether the policies and procedures statement contains a valid waiver is immaterial since EnCon is immune from liability under the IIA.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Bjorgen, C.J.

Lee, J.