

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506892

DIANE HUDSON

CLAIMANT

SUPERIOR SENIOR CARE

RESPONDENT

LIBERTY MUTUAL INSURANCE  
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED FEBRUARY 23, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondents represented by MICHAEL RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on December 6, 2005, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on August 31, 2005. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the time of the hearing. Immediately prior to the commencement of the hearing, an amendment was made concerning the alleged accident and injury date, the period of alleged temporary total disability was delineated, and the issue of permanent partial disability was withdrawn. Both parties concurred in these changes. A copy of the pre-hearing order with these amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. The respondent, Superior Senior Care, was insured for

workers' compensation purposes by Liberty Mutual Insurance Company on August 11, 2003.

2. The claim is controverted in its entirety.

By agreement of the parties the issues to be litigated and resolved at the present time were limited to the following:

1. whether the claimant was an employee of Superior Senior Care on August 11, 2003.
2. whether the claimant sustained compensable injuries to her neck, right shoulder, and right hip in a specific incident on August 11, 2003.
3. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from August 19, 2003 through November 16, 2004, and attorney's fees.
4. The appropriate weekly compensation rates.
5. The effect of Ark. Code Ann. §11-9-701 on any benefits prior to July 9, 2005.

In regard to these issues, the claimant contends:

"On or about August 13, 2003, the claimant suffered an accidental injury to her cervical spine, right shoulder and hip. Said injury arose out of her employment and occurred when she slipped and fell entering the home of a patient. Claimant is entitled to temporary total disability from the date of the injury to a date yet to be determined, reasonable and necessary medical benefits, mileage and attorney's fees."

In regard to these issues, the respondents contend:

"The respondents will contend that the employee-employer relationship did not exist between the claimant, Diane Hudson, and Superior Senior Care, Inc; that the claimant did not sustain a compensable injury on August

13, 2003;and, in the alternative, that the claimant did not give notice as required by A.C.A. 11-9-701 prior to the respondents' receipt of the claimant's AR-C dated July 9, 2005 and that the respondents are not therefore responsible for any compensation benefits prior to their receipt of the July 9, 2005 AR-C."

#### DISCUSSION

The central issue in this claim is the question of whether the claimant was an "employee" of respondent Superior Senior Care, at the time of the alleged accident and injury on August 11, 2003. There is no presumption of the existence of an employee-employer relationship. The burden rests upon the claimant to prove the existence of this relationship.

The law is well settled in regard to the factors to be considered in determining whether the relationship between the parties represents an employee-employer relationship or an independent contractor relationship. These include such things as:

- (1) The right to control the means and method by which the work is done;
- (2) The right to terminate the employment without liability;
- (3) The method of payment, whether by time, job, piece, or other unit of measurement;
- (4) The furnishing, or obligation to furnish the necessary tools, equipment, and material;
- (5) whether the person employed is engaged in a distinct occupation or business;
- (6) The skill required in a particular occupation;
- (7) whether the employee is in business;
- (8) whether the work is an integral part of the business of the employer; and

(9) The length of time for which the person is employed.” Franklin v. Arkansas Craft, Inc., 5 Ark. App. 264, 635 S.W. 2<sup>nd</sup> 286(1982)

Although the claimant clearly had a “contract” with Superior Senior Care (see Respondent’s Exhibit No. 1, pages 4-6), the relationship created by this agreement does not meet the requirements for an employment contract. Nor does this contract create the normal “independent contractor” relationship, as it is generally seen in the workers’ compensation context. Generally, under an employment contractor a normal “independent contractor” contract, the claimant is agreeing to provide labor or specialized services to or for the benefit of the contracting party in exchange for money or other compensation.

Under the agreement between the claimant and Superior Senior Care, the claimant is not contractually obligated to perform any services for the direct benefit of Superior Senior Care, nor is Superior Senior Care obligated to compensate the claimant out of its own funds for any services that the claimant may ultimately provide. In fact, the contractual relationship created by the contract between the claimant and Superior Senior Care obligates Superior Senior Care to provide services for the claimant (i.e. making a good faith attempt to obtain an employment position for the claimant). In turn, the monetary compensation provided is to be paid by the claimant to the respondent Superior Senior Care, when such an employment position has been obtained for her by Superior Senior Care. In effect, the claimant is contracting the services of Superior Senior Care, rather than Superior Senior Care

contracting the services of the claimant.

Although the actual contract between respondent Senior Care and the individual to whom the claimant was providing services at the time of the accident and injury (an Ola Philpott) has not been introduced into evidence, the respondents have submitted an example of the form contract that they contend existed between Superior Senior Care and Ms. Philpott (Respondents' Exhibit No. 1, page 3). Under the terms of this agreement, Superior Senior Care is obligated to create an escrow account for the "client" (Ms. Philpott) and to pay the contracted "care giver" (the claimant) the agreed upon wages out of this escrow account, less the fees the "care giver" (the claimant) is obligated to pay Superior Senior Care for its service of obtaining the "care giver" this particular position. In exchange for setting up and maintaining the escrow account, Superior Senior Care receives an additional fee from the "client" (Ms. Philpott).

However, it is evident from the record that the "client" is not obligated to enter into the contract creating the escrow plan and may simply pay the care giver directly. Under these circumstances, the care giver is then obligated to pay the agreed commission to Superior Senior Care, pursuant to the contract between the care giver and Superior Senior Care.

Under the two separate contracts, Superior Senior Care is obligated only to make a good faith attempt to obtain potential job leads for the claimant and to obtain prospective employees or "care givers" for Ms. Philpott and to handle the payment of any employee

or “care giver” Ms. Philpott may accept or hire. Superior in no way guarantees the claimant any particular job or set amounts of work. In fact, Superior does not even guarantee that the claimant will actually be paid for any services provided. On the other hand, Superior, itself, is not contractually obligated to prove “care giver services” to Ms. Philpott or even to guarantee that it will actually obtain a suitable person to do so.

It is apparent from the contracts, themselves, and the other evidence presented that the actual hiring of the “care giver” is up to the client or in this case, Mr. Philpott. It is equally apparent that once Ms. Philpott had accepted or hired the claimant, Superior Senior Care, did not have authority or a right to destroy or terminate this employment relationship. The only right that Superior Senior Care had was to receive from the claimant its contracted commission or fee for facilitating this employment for apparently as long as the employment lasted. In fact, Superior Senior Care could have been legally liable had it interfered with this employment relationship.

It is also apparent from the contract, themselves, and the other evidence presented that Superior Senior Care had no right to control the nature, method, or manner of the services that the claimant provided Ms. Philpott. It also had no right or authority to set the times or lengths of time these services were to be provided. Finally, it had no right even to set the amount of compensation to be paid for these services, except to indirectly effect these amounts by deducting it from the agreed upon fee or

commission. All of these matters were left to the claimant and the "client," in this case Ms. Philpott.

The record also shows that Superior was only legally obligated to pay the claimant for her services to Ms. Philpott out of Ms. Philpott's funds. It was not legally obligated to pay the claimant out of its own funds for any services or labor the claimant provided to Ms. Philpott or any other "client."

The evidence shows that the claimant was not obligated to accept any positions obtained through referral from Superior Senior Care. Nor was she prevented from obtaining "care giver" positions through other agencies or on her own. In fact, the record reveals that most of the claimant's income for 2003 was derived from such a position.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove that the relationship of employee-employer existed between her and Superior Senior Care at the time of her alleged injury on August 11, 2003. In fact, it is my opinion that the evidence even fails to prove that she was an independent contractor of Superior Senior Care on that date. It is my opinion that the greater weight of the credible evidence establishes that the only relationship between the claimant and Superior Senior Care on that date was simply that of client and employment agency. Clearly, the relationship of employee-employer did exist on that date, but it existed between the claimant and Ms. Philpott, who has not been made a party to this claim.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. The claimant has failed to prove the existence of an employee-employer relationship between herself and Superior Senior Care at the time of her alleged injury on August 11, 2003.
3. Superior Senior Care and its workers' compensation carrier, Liberty Mutual Insurance Company, would have no liability under the Act for this alleged injury.
4. Superior Senior Care and Liberty Mutual Insurance Company has controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge