STATE OF MICHIGAN

COURT OF APPEALS

STATE AUTO PROPERTY & CASUALTY INSURANCE, Plaintiff-Appellee, v A-3, INC., Defendant-Appellant.	UNPUBLISHED May 22, 2008 No. 279554 WCAC LC No. 06-000106

Before: White, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals by leave granted the June 26, 2007 opinion and order of the Worker's Compensation Appellate Commission (WCAC), which affirmed the April 7, 2006 magistrate's order and opinion finding that Henry Leon was defendant's employee on April 8, 2003. Because we conclude there were no errors warranting relief, we affirm.

At the time in question, Leon worked as a door-to-door salesman selling Kirby vacuums. Leon sold the vacuums on consignment from defendant under an "independent dealer agreement." From October 2002 until April 8, 2003, Leon's sole source of income was the commissions paid to him by defendant based on his sales of Kirby vacuums.

On April 8, 2003, Leon was injured in an automobile accident. At the time, he was driving a van that he leased from defendant. Plaintiff insured the van at the time of the accident and paid first-party no-fault benefits to Leon as a result of the injuries he sustained in the accident. Defendant did not carry workers' disability compensation insurance covering Leon.

Plaintiff commenced these proceedings in the Bureau of Workers' Disability Compensation to recoup from defendant the cost of medical benefits, wage loss benefits, and other benefits paid to Leon following the accident. The sole question presented to the magistrate for resolution was whether Leon was an independent contractor or defendant's employee at the time of the accident.

The magistrate found that Leon was defendant's employee at the time of the accident on the basis that Leon acted in the service of defendant under an express contract of hire, did not maintain a separate business selling vacuums, did not hold himself out to the public as someone

who rendered the same services as defendant, and was not a statutory employer. See MCL 418.161(1)(*l*), (n). The WCAC affirmed in a split decision.

On appeal, defendant argues that the WCAC erroneously affirmed the magistrate's determination that Leon was its employee. According to defendant, Leon was not its employee within the meaning of MCL 418.161 and *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005), because the record evidence established that defendant did not pay Leon "wages" and, therefore, Leon's work relationship with defendant was not one "of hire" within the meaning of subsection 161(1)(*1*). Further, according to defendant, the unambiguous terms of the independent dealer agreement, as well as other evidence, established that Leon was an independent contractor within the meaning of MCL 418.161(1)(n). We do not agree that the WCAC's decision to affirm was erroneous.

Our review of the commission's decision is limited to ensuring the integrity of the administrative process. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701; 614 NW2d 607 (2000). Accordingly, this Court's review of the WCAC's factual determinations is extremely deferential: "As long as there exists in the record any evidence supporting the WCAC's decision, and as long as the WCAC did not misapprehend its administrative appellate role (e.g., engage in de novo review; apply the wrong rule of law), then the judiciary must treat the WCAC's factual decisions as conclusive." *Id*. at 703-704.

At issue in this matter is whether Leon was an employee of defendant or an independent contractor at the time of the accident. Whether Leon was an employee of defendant for purposes of the Workers' Disability Compensation Act (WDCA), MCL 418.101 *et seq*., is a question of law involved in a final order of the WCAC subject to our de novo review. *Id*. at 697 n 3; *Oxley v Dep't of Military Affairs*, 460 Mich 536, 540-541; 597 NW2d 89 (1999).

The WDCA defines the term "employee" for purposes of the WDCA in § 161. See MCL 418.161; *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 570; 592 NW2d 360 (1999). In order to determine whether Leon was an employee within the meaning of § 161, Leon must meet the definition of employee found at both MCL 418.161(1)(*l*) and (n). *Hoste, supra*, 459 Mich at 571. Under MCL 418.161(1)(*1*), an employee is "[e]very person in the service of another, under any contract of hire, express or implied.…" But MCL 418.161(1)(n) further provides that an employee means:

> Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act.

The first task under these statutory provisions is to ascertain whether Leon was in the service of defendant under any express or implied contract of hire. *Reed, supra*, 473 Mich at 530. To make this determination, and because defendant does not challenge that Leon was in its service at the time of the accident, two questions must be answered. First, was Leon in service pursuant to an express or implied contractual relationship? Second, was the contractual relationship one of hire? *Id*. Defendant concedes that Leon was in its service under an express contract—the October 2002 Independent Dealer Agreement. Defendant challenges, however,

the WCAC's decision to affirm the magistrate's conclusion that the contractual relationship was one of hire.

Our Supreme Court has explained that,

> the linchpin to determining whether a contract is "of hire" is whether the compensation paid for the service rendered was not merely a gratuity but, rather, "intended as wages, i.e., real, palpable and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer." [*Reed, supra*, 473 Mich at 532, quoting *Hoste, supra*, 459 Mich at 576.]

Hence, whether a particular contract was one "of hire" will depend on the nature of the compensation paid. Courts should normally examine the parties' actual contract to determine whether the compensation was real, palpable and substantial when measured against the services performed. *Reed, supra*, 473 Mich at 532, 535.

In the present case, Leon testified that he received a commission for every vacuum system he sold, as well as a commission for every vacuum system sold by the members of his crew. He received his commission checks from defendant. Defendant also supplied Leon and the IRS with 1099 Forms, listing Leon's annual "Nonemployee compensation". These 1099 Forms reflect that Leon earned $18,776 in 2004 and $7,730 in 2003. In *Reed*, the Court determined that receiving $35 to $40 for approximately 8 hours of rendering services was sufficient to establish that an implied contract was one "of hire." *Reed, supra*, 473 Mich at 532-533. Likewise, the sums earned by Leon in commissions are sufficient to establish that the contractual relationship between Leon and defendant was one "of hire" for purposes of MCL 418.161(1)(*l*). The sums earned and paid were more than mere gratuities and reflect "real, palpable and substantial consideration." The WCAC's affirmance in this regard reflects a proper application of the applicable legal principles and is supported under the "any" evidence standard. *Mudel, supra*, 462 Mich at 701.

The second task under these statutory provisions is to determine whether Leon is an independent contractor under MCL 418.161(1)(n). MCL 418.161(1)(n) provides that a person "performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury" is an employee "if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act." Leon clearly performed a service "in the course of the trade, business, profession, or occupation" of defendant at the time of the injury. *Id.* Hence, he would qualify as an employee as long as he (1) did not maintain his own business in relation to the service he provided defendant, (2) did not hold himself out to the public to render the same service that he performed for the employer, and (3) was not an employer subject to the WDCA. *Reed, supra*, 473 Mich at 535. Therefore, if Leon met any one exclusionary criteria, he would not meet the definition of an employee. *McCaul v Modern Tile & Carpet, Inc.*, 248 Mich App 610, 616; 640 NW2d 589 (2001).

There was no evidence that Leon was an employer subject to the WDCA or that he held himself out to the public as a seller of vacuums other than those he sold for defendant. Thus, the

only question is whether Leon maintained his own business in relation to the service he provided to defendant. Although a review of the record evidence reveals significant evidence that, if believed, would support the conclusion that Leon acted as an independent contractor, there was also evidence from which one might conclude that Leon did not in fact maintain his own business in relation to his sales activities. Leon was theoretically permitted to hire his own employees and advertise, but did not. Leon sold only defendant's products, which sales constituted his sole source of income. He also did not form a separate entity for his sales activities and did not do business under an assumed name. Because there was evidence in support of the WCAC's determination that Leon did not maintain his own business in relation to his service to defendant, we must defer to that determination. *Mudel, supra,* 462 Mich at 703-704.

There were no errors warranting relief.

Affirmed.

/s/ Helene N. White
/s/ Michael R. Smolenski