STATE OF MICHIGAN

COURT OF APPEALS

TONY BOOTH, Plaintiff-Appellant,	UNPUBLISHED October 25, 2012
V	No. 304883 Kalamazoo Circuit Court
DJ'S PROFESSIONAL TREE SERVICE, Defendant-Appellee.	LC No. 2010-000305-NO

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

On April 22, 2009, plaintiff was injured while working for defendant. Defendant did not have worker's compensation insurance at the time of plaintiff's injury. Plaintiff subsequently sued defendant asserting in one count that defendant was an uninsured employer under the Michigan Workers Disability Compensation Act (WDCA), MCL 418.101 *et seq*., and so strictly liable for plaintiff's damages. MCL 418.641(2). Defendant moved for summary disposition, arguing that it was not an employer for the purposes of the WDCA and, thus, plaintiff could not base his claim on defendant's failure to purchase worker's compensation insurance. Defendant submitted labor records for the 56 weeks preceding plaintiff's injury, and both parties relied on these labor records to support their respective positions. After reviewing defendant's labor records, the trial court found that defendant was not an "employer" under MCL 418.115 of the WDCA and granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

Whether an entity is an "employer" under the WDCA is a question of law subject to de novo review. See *McCaul v Modern Tile & Carpet, Inc*, 248 Mich App 610, 615; 640 NW2d 589 (2001); *Clark v United Technologies Auto, Inc*, 459 Mich 681, 693-694; 594 NW2d 447 (1999). The WDCA "exposes covered employers to strict liability arising from employees' job-related injuries[.]" *Luster v Five Star Carpet Installations, Inc*, 239 Mich App 719, 730 n 4; 609 NW2d 859 (2000). "[T]he Worker's Disability Compensation Act, by its terms, applies to injuries that occur in this state as long as the employer meets a statutory definition of 'employer.'" *Alford v Pollution Control Indus of America*, 222 Mich App 693, 699; 565 NW2d 9 (1997). MCL 418.115 provides, in relevant part:

[The WDCA] shall apply to:

> (a) All private employers, other than agricultural employers, who regularly employ 3 or more employees at 1 time.
>
> (b) All private employers, other than agricultural employers, who regularly employ less than 3 employees if at least 1 of them has been regularly employed by that same employer for 35 or more hours per week for 13 weeks or longer during the preceding 52 weeks.

We first consider the application of MCL 418.115(a) which provides that an employer is subject to the WDCA if it regularly employs at least three employees at one time. The defendant bears the burden of demonstrating that it does not regularly employ three or more employees at one time. *Alford*, 222 Mich App at 698. The controlling case as to the application of this test is *Berridge v Willcome*, 25 Mich App 339; 181 NW2d 276 (1970). In *Berridge*, we explained that the statute does not require that the employer always employ three or more employees. Instead, we held that where there is a "pattern of conduct" of having three employees at a time even if the work is seasonal and there are periods of no work, or there are periods of work with less than three employees, the standard is met. However, in this case, the wage records on which both sides rely reveal that that defendant rarely employed three or more employees during the same week and on only three occasions during the 56 weeks preceding plaintiff's injury employed three or more employees on the same day. Plaintiff argues that these records are not accurate, but did not offer evidence of any different data and in fact, relied on the defendant's records. Plaintiff also argues that the standard is not purely retrospective and that it can be met if the defendant intends to have three employees on a regular basis going forward, including the date of plaintiff's injury going forward. We agree that a prospective analysis is not excluded by the language of the statute. However, although there were three employees on the date of plaintiff's injury, plaintiff has not offered any proofs upon which the employer's intent to have three employees regularly thereafter can be based. Thus, the trial court properly concluded that plaintiff's proofs do not raise a question of fact under subsection (a).

Subsection (b) has, by its language, a purely retrospective test and requires that defendant have employed one employee for 35 or more hours for 13 of the 52 weeks preceding plaintiff's injury. The records submitted do not support such a finding or create a question of fact.

Thus, the trial court did not err by finding that defendant was not an "employer" under MCL 418.115(b) and in dismissing the relevant count in plaintiff's complaint. Accordingly, we affirm and remand for further proceedings as to plaintiff's negligence claim which was not dismissed. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause