

STATE OF MICHIGAN
COURT OF APPEALS

MITCHELL CORPORATION OF OWOSSO,

Plaintiff-Appellant,

v

DEPARTMENT OF CONSUMER AND
INDUSTRY SERVICES, BUREAU OF
WORKERS AND UNEMPLOYMENT
COMPENSATION,

Defendant-Appellee.

FOR PUBLICATION
August 12, 2004
9:00 a.m.

No. 248321
Court of Claims
LC No. 02-219-MZ

Official Reported Version

Before: Zahra, P.J., and Talbot and Wilder, JJ.

Zahra, P.J. (*concurring in result*).

I concur in the majority's conclusion that the trial court properly granted defendant's motion for summary disposition. I write separately, however, because I reach this conclusion based solely on the language in MCL 418.611(1)(a), which plainly provides discretion to the director to determine "a reasonable form and amount" of security.

In my view, the issue is expressly controlled by MCL 418.611(1)(a), which provides in relevant part:

If the director determines it to be necessary, the director shall require the furnishing of a bond or other security in a reasonable form and amount. Such security as may be required by the director may be provided by furnishing specific excess insurance, aggregate excess insurance coverage through a carrier authorized to write in this state in an amount acceptable to the director, a surety bond, an irrevocable letter of credit in a format acceptable to the bureau, and claims payment guarantees.

While plaintiff maintains that defendant breached the memorandum of understanding that is required pursuant to 1999 AC, R 408.43q, plaintiff is actually challenging the director's decision to retain funds from the claimed irrevocable letter of credit notwithstanding that defendant is no longer self-insured and that there are no claims pending against defendant for the period that it was self-insured. The memorandum of understanding only operates to affirm the employer's acceptance of the certain terms within the irrevocable letter of credit. *Id.* Moreover,

Rule 408.43q only addresses how an established trust will administer the claimed funds, not whether those funds are necessary for security.

Thus, MCL 418.611(1)(a) is the only rule of law that addresses whether it is reasonable to retain the claimed funds. Again, "[i]f the director determines it to be necessary, the director shall require the furnishing of a bond or other security *in a reasonable form and amount*." MCL 418.611(1)(a) (emphasis supplied.) Under this provision, the director has discretion to determine if security is necessary under MCL 418.611(1)(a), regardless of whether defendant complies with the administrative rules or breaches the memorandum of understanding.

Contrary to defendant's position, however, the director's discretion to determine if security is necessary under MCL 418.611(1)(a) is not unfettered. "To reverse an agency's decision as an abuse of discretion under [MCL 26.306(1)(e)], a court must find a result so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994); *Marrs v Bd of Medicine*, 422 Mich 688, 693-694; 375 NW2d 321 (1985). This Court, in turn, reviews a circuit court's review of an agency's decision for clear error. *Glennon v State Employees' Retirement Bd*, 259 Mich App 476, 478; 674 NW2d 728 (2003). A decision is clearly erroneous when this Court is left with a definite and firm conviction that a mistake was made. *Id.*

Here, I would hold that trial court did not clearly err because the director's decision to retain the claimed funds was reasonable and, therefore, not an abuse of discretion. Although there are currently no worker's compensation claims pending against plaintiff, the director's belief that some may arise in the future is reasonable. Moreover, defendant has shown that the amount of funds remaining may not be sufficient to cover minor claims. Because it is reasonable for the director to require plaintiff to provide security under the present circumstances, the trial court's decision is proper.

/s/ Brian K. Zahra