# STATE OF MICHIGAN

# COURT OF APPEALS

GRAYFORD GRAY, with JANE GRAY as Guardian,

Plaintiff-Appellant,

v

KROLL CONSTRUCTION, INCORPORATED, THE ACCIDENT FUND COMPANY and SECOND INJURY FUND,

Defendants-Appellees.

UNPUBLISHED
November 26, 2002

No. 235717
WCAC
LC No. 000417

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order of the Worker's Compensation Appellate Commission (WCAC) reversing the magistrate's determination that plaintiff was entitled to worker's compensation benefits because, under MCL 418.161, he was defendant's employee. We affirm.

On April 19, 1999, plaintiff fell from a ladder while installing aluminum siding and suffered disabling injuries. The sole issue on appeal is whether plaintiff was defendant's employee or an independent contractor at the time of his fall. The facts are, generally, not in dispute.

Plaintiff installed aluminum siding for defendant, exclusively, for over fifteen years. Defendant's brother Rayford also worked for defendant. Plaintiff's wife would call defendant on a daily basis and receive plaintiff's and Rayford's siding order assignments. Plaintiff's wife would then call the customer, indicating she was a representative of defendant, to schedule the job. Defendant would secure any necessary permits and deal with building inspectors. Plaintiff would obtain the siding materials from defendant's designated suppliers, and would not pay for the materials. Defendant provided plaintiff with Kroll Construction hats, shirts, signs for plaintiff's truck, and yard signs. Plaintiff had his own truck, ladder, and tools. Plaintiff did not have employees but, two years prior, had attempted to help his son's friend with work but the man did not show up regularly. If a change in the siding job was required, plaintiff contacted a salesman who came to the job site to render the necessary decisions. When a siding job was completed, Rayford's wife would submit an itemized bill, that was written on a blank piece of paper, to defendant for payment. Plaintiff and Rayford were paid for each square of siding they

applied. However, defendant paid them "bonuses" when they were going on vacation and at Christmas time. At some point, defendant purchased a worker's compensation insurance policy for plaintiff, using defendant's address as the policy address, however the policy did not cover plaintiff but would cover plaintiff's employees, if he had any. Defendant issued plaintiff an annual 1099 form and, according to the 1997 and 1998 income tax forms placed into evidence, plaintiff listed Kroll Construction as his business name, assessed a self-employment tax under his social security number, and deducted expenses for and depreciated his tools and vehicles.

After an extensive review of the facts and evidence of record, the magistrate determined that plaintiff was an employee of defendant within the contemplation of MCL 418.161(1)(l) because at the time of injury the work was performed under a contract of hire. The magistrate also found, citing *McKissic v Bodine*, 42 Mich App 203; 201 NW2d 333 (1972), that plaintiff was an employee within the contemplation of MCL 418.161(1)(n) [formerly MCL 418.161(1)(d)], which provides:

> 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.

In this regard, first, the magistrate found that plaintiff was performing service in the course of defendant's siding business at the time of his injury. Significantly, with regard to the "separate business" requirement, the magistrate found that (1) contrary to defendant's arguments, plaintiff's tax returns were not conclusive on the issue because (a) that is not the only consideration (b) the WDCA's purpose is different than the purpose of tax laws, (c) plaintiff regarded himself as defendant's employee as evidenced by his listing defendant's name as his business name, (d) the two tax returns placed into evidence, 1997 and 1998, did not reflect the state of affairs in 1999, the year of the injury, (e) on the 1997 and 1998 tax returns, plaintiff used his social security number, not an employer identification number, and (f) all taxpayers may deduct certain job and miscellaneous expenses; (2) plaintiff's income was solely derived from the work he performed for defendant; (3) plaintiff's work required a limited amount of equipment, consisting of ladders, saws, hammers, and other small tools; (4) plaintiff did not supply any materials and defendant directed plaintiff to the specific suppliers and paid the suppliers; and (5) defendant paid plaintiff bonuses. Next, the magistrate found that plaintiff worked exclusively for defendant, did not have business cards, and did not advertise; therefore, plaintiff did not hold himself out to and did not perform service to the public. And, last, plaintiff was not an employer subject to the WDCA. Accordingly, the magistrate concluded that plaintiff was defendant's employee on the date of his injury and entitled to benefits.

The WCAC reversed the magistrate's decision, holding:

> The magistrate's analysis cannot stand in light of *Betancourt* [*v Ronald Smith*, 1999 ACO #608 and *Blanzy v Brigadier General Contractors, Inc*, 240 Mich App 632; 613 NW2d 391 (2000)]. The magistrate misstated the importance of tax returns when determining the existence of a separately maintained business. That overemphasis led him to a legally erroneous conclusion, that plaintiff did not maintain a separate business. We believe a proper analysis leads to the opposite conclusion. Namely, plaintiff's tax filings declare business income, take

> deductions for depreciating assets and *acknowledge the owing of self-employment taxes.* Quite simply, when a person voluntarily pays $5,783.00 in self-employment taxes, they have essentially admitted to maintaining a separate business.[3*]
>
> [3*] The magistrate's concentration on the 1999 return is equally misplaced. Trial occurred in May of 2000. Plaintiff's 1997 tax return is dated April 4. Plaintiff's 1998 tax return is not dated. This suggests that the 1999 tax return was not available at the time of trial. Moreover, the 1999 tax return was under plaintiff's exclusive control. Thus, if it could prove that plaintiff's tax status changed, plaintiff would have introduced the document. Therefore, the fact-finder would not speculate to find that plaintiff's filing status remained the same in 1999. In fact, no competent and substantial evidence supports his finding that the status was unknown.
>
> The remaining proofs also support the conclusion that plaintiff maintained a separate business. Plaintiff employed other workers to assist him. Plaintiff received payment for the amount of siding he applied rather than an hourly or salaried wage. Plaintiff admitted that he owned his tools and truck. Finally, all of the evidence showed that independent contractors apply siding. Thus, under *Betancourt*, plaintiff does not receive benefits. [WCAC Opinion, p 8.]

This Court granted plaintiff leave to appeal.

The WCAC must consider the magistrate's findings of fact conclusive if they are supported by competent, material, and substantial evidence on the entire record. MCL 418.861a(3); *Mattison v Pontiac Osteopathic Hosp*, 242 Mich App 664, 670; 620 NW2d 313 (2000). Substantial evidence is evidence that a reasonable person would accept as adequate to justify a conclusion. *Id*. "Where substantial evidence on the whole record does not exist to support the magistrate's factual finding, the WCAC may substitute its own finding of fact for that of the magistrate." *Id*. This Court, in contrast, treats as conclusive findings of fact made by the WCAC acting within its powers. MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709-710; 614 NW2d 607 (2000). "As long as the WCAC did not 'misapprehend or grossly misapply' the 'substantial evidence' standard test and there exists in the record evidence supporting the WCAC's decision, then this Court must treat the WCAC's factual decisions as conclusive." *Mattison*, *supra* at 671. However, this Court reviews de novo questions of law involved with any final order of the WCAC. *McCaul v Modern Tile & Carpet, Inc*, 248 Mich App 610, 615; 640 NW2d 589 (2001). Whether an individual is an employee within the contemplation of the WDCA presents a question of law subject to de novo review. *Id*.

The dispositive and sole issue on appeal is whether plaintiff was an employee within the contemplation of MCL 418.161(1)(n) at the time he sustained his injuries. An "employee" is:

> 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. [MCL 418.161(1)(n).]

Here, the magistrate and WCAC disagreed with regard to whether plaintiff maintained a separate business. See *Luster v Five Star Carpet Installations, Inc*, 239 Mich App 719, 725; 609 NW2d

859 (2000). Because the WCAC must consider the magistrate's findings of fact conclusive if supported by substantial evidence, we consider whether the WCAC's reversal exceeded its authority. See *Blanzy v Brigadier General Contractors, Inc*, 240 Mich App 632, 638; 613 NW2d 391 (2000).

In holding that plaintiff was an independent contractor, the WCAC considered as decisive evidence plaintiff's tax returns from the two years preceding the injury which indicated that plaintiff declared business income and paid self-employment taxes. The WCAC relied on *Blanzy*, *supra*, and *Betancourt v Ronald Smith*, 1999 ACO 608, to support its reversal of the magistrate's decision. In *Blanzy*, the plaintiff was the sole stockholder of a business that he incorporated, HCM. Most of HCM's business was performed under contract with the defendant. The plaintiff claimed to be an employee of HCM when he was injured while performing work for the defendant. However, the evidence revealed that the plaintiff performed work for another entity other than HCM, and the plaintiff's and HCM's tax records indicated that the plaintiff was HCM's independent contractor. The magistrate found that the plaintiff was not HCM's employee because he maintained a separate business as evidenced by HCM's method of paying taxes for "subcontractor services" and the plaintiff's declaration of business income derived from his "self-employment" on his tax forms. *Id*. at 636, 642-643. The WCAC reversed the magistrate's finding but this Court reversed the WCAC, holding that there was "substantial evidence for the magistrate's finding that plaintiff ran his own business, and that the WCAC should have deferred to this finding." *Id*. at 643.

Similarly, in *Betancourt*, *supra*, the magistrate concluded that the plaintiff was an independent contractor as evidenced by the plaintiff's tax records which showed that he treated income from the defendant as business revenue, depreciated the cost of the garage at his home, and deducted the replacement cost of his tools. The magistrate also found that the plaintiff listed himself as self-employed on an accident insurance policy that he purchased, and was assessed self-employment taxes on his business income after being audited. The WCAC affirmed, holding that the facts established that the plaintiff maintained a separate business.

These cases are similar to two other cases considered by this Court. In *Luster*, *supra*, the magistrate found that the plaintiff was an independent contractor because he had filed a profit and loss statement with the IRS, hired and paid for his own helper, rented his tools and truck, paid for his own insurance, signed a contract stating that he was an independent contractor, bought his own supplies, and worked with only minimal supervision. *Id*. at 723. The WCAC affirmed, as did this Court which held, in part, that the defendant paid the plaintiff as an independent contractor who ran his own business, including that it supplied the plaintiff with an IRS Form 1099 each year. *Id*. at 727. In addition, this Court noted that the plaintiff furnished his own supplies, paid rent for his truck and equipment, paid and hired his own helper, and worked with only minimal supervision by the defendant. *Id*.

Likewise, in *McCaul*, *supra*, the magistrate found that the plaintiff was an independent contractor because he owned and actively managed a sole proprietorship for which he filed the appropriate tax forms and secured worker's compensation insurance. *Id*. at 613. The WCAC affirmed the magistrate's finding, as did this Court, which agreed that the plaintiff operated a sole proprietorship for which he was issued a Form 1099 annually. *Id*. at 617.

In this case, the WCAC reversed the magistrate's award of benefits primarily because it considered the information contained on plaintiff's tax returns dispositive of the issue whether plaintiff maintained a separate business. In particular, plaintiff filed individual tax returns and Schedule C, Profit and Loss from Business (Sole Proprietorship), forms which indicated income derived solely from his business, from which he claimed deductions, and for which he paid self-employment taxes. In light of the prevailing case law on this issue, we agree that plaintiff's tax records were very persuasive factors in support of the conclusion that plaintiff was an independent contractor for defendant. Combined with the undisputed facts that plaintiff was paid by the square of siding applied, and not an hourly or salaried wage, for which he submitted an itemized bill for payment purposes, and owned his own truck and tools, we agree that plaintiff was an independent contractor. The magistrate's finding that plaintiff did not maintain a separate business, contrary to plaintiff's own tax records, was not supported by competent, material, and substantial evidence; therefore, we conclude that the WCAC's reversal did not exceed its authority.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra