STATE OF MICHIGAN

COURT OF APPEALS

BLAINE C. KING,

Plaintiff/Cross-Appellant,

v

WESTFIELD INSURANCE CO,

Defendant-Appellee/Cross-Appellee,

and

GENERAL CASUALTY INSURANCE CO,

Defendant-Appellant/Cross-Appellee,

and

INDIANA INSURANCE CO,

Defendant.

UNPUBLISHED
November 4, 2004

No. 247451
Kent Circuit Court
LC No. 01-012556-CK

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

This case arises from a dispute involving the insurance company responsible for payment of personal injury protection (PIP) benefits to plaintiff. The trial court determined that defendant General Casualty Insurance Company was the responsible party because plaintiff was an employee of defendant Wiese Oldsmobile, its insured. Plaintiff filed a cross-appeal seeking to hold his own insurer, Westfield Insurance Company, responsible for payment of benefits in the event of reversal. We reverse the trial court's holding that plaintiff was an employee of defendant Wiese Oldsmobile and the denial of General Casualty Insurance Company's motion for summary disposition.

Plaintiff, a retiree, supplemented his income by obtaining part-time employment as a driver for a florist. At the florist, plaintiff worked when they were short-staffed or during the holidays. He generally worked from 8:00 a.m. to 5:00 p.m., was paid an hourly wage, and taxes

were taken from his wages. Plaintiff's brother contacted him about driving for Wiese Oldsmobile. The company would hire drivers to drive to different locations, pick up vehicles, and return them to the company in Indiana, where plaintiff resided. Plaintiff did not fill out an employment application. A valid driver's license was the only requirement for the position. Plaintiff was paid by the job, and Wiese Oldsmobile determined the job fee. For example, Wiese Oldsmobile would determine that a trip to Fort Wayne, Indiana was worth $35. If the driver wanted a higher fee, the company would simply not utilize that driver anymore. Taxes were not taken from plaintiff's wages, and he received a 1099 form at the end of the year from the company. Other than a wage, plaintiff was not provided with any other benefits, such as health insurance or vacation days.

There was no formal hiring and firing process for drivers. A driver could accept or reject any assignment. Plaintiff could determine whom he wanted to take with him on any given trip. He was not advised to take any specific route and was not prohibited from taking "side trips." There was no time frame established for the return of the picked up vehicle. Plaintiff submitted vouchers for any expenses incurred on the trip. He was only given a company credit card for long trips. Plaintiff was not provided a cellular telephone, and he obtained one for his own use on the trips. Plaintiff was invited to the company Christmas party and received a ham at Christmas. Although some characterized his employment as contractual, plaintiff thought he was an employee.

Drivers were provided with vehicles to use for the pickups. On December 21, 2000, plaintiff was injured in Michigan while driving a vehicle owned by Wiese Oldsmobile during the course of his employment as a driver. Wiese Oldsmobile's president submitted an affidavit opining that plaintiff was not an employee of the dealership on the date of the accident. Rather, plaintiff was issued a 1099 form, whereas employees were issued W-2 forms at the end of the tax period. Plaintiff eventually recovered from his injuries and resumed his employment with the florist. However, he was never called to drive for Wiese Oldsmobile again.

The vehicle driven by plaintiff at the time of the accident was owned by Wiese Oldsmobile and insured by General Casualty Insurance Company. Plaintiff had his own vehicle at the time of the accident and was insured by Westfield Insurance Company. The trial court determined that General Casualty was responsible for PIP benefits owed to plaintiff based on his status as an employee. The trial court held that plaintiff was an employee regardless of whether the economic realities test was applied or whether the definition of employee, as found in the Workman's Disability Compensation Act, applied.

We review summary disposition decisions de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). Generally, a person injured in an automobile accident must first seek no-fault benefits from his own insurer. MCL 500.3114(1); *Citizens Ins Co v Auto Club Ins Ass'n*, 179 Mich App 461, 464; 446 NW2d 482 (1989). However, an employee who suffers an accidental bodily injury while occupying a motor vehicle owned or registered to his employee shall receive insurance benefits from the insurer of the furnished vehicle. MCL 500.3114(3). "Employee" is not defined in the statute, and the economic realities test has been applied as the standard to determine the existence of an employment relationship based on the no-fault act. *Citizens*, *supra* at 464-465; *Parham v Preferred Risk Mutual Ins Co*, 124 Mich App 618, 621-624; 335 NW2d 106 (1983). To determine the existence of an employee relationship, the following factors are considered: (1) control of the worker's duties; (2) payment of wages; (3)

right to hire, fire and discipline; and (4) the extent the duties performed are an integral part of the employer's business toward achieving a common goal. *Citizens, supra* at 465. An independent contractor is "one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished." *Parham, supra* at 622-623.

Applying the facts to the law, the trial court erred in concluding that plaintiff was an employee of Wiese Oldsmobile.[1] *Capuzzi, supra*. Plaintiff was furnished a vehicle to drive to a location to pick up another vehicle. To the extent a second driver was needed for the return vehicle, plaintiff was able to select the person who would accompany him on the trip. There was little control executed over the method of picking up and returning the vehicle. Plaintiff was able to select the route there and back and was not given time constraints. Moreover, plaintiff was able to have other employment, with the florist, and could reject any vehicle assignment given by Wiese Oldsmobile. Although Wiese Oldsmobile dictated the appropriate fee based on the distance of the trip, all drivers were paid a flat rate without any withdrawal of the appropriate taxes. Under the circumstances, the relationship between plaintiff and Wiese Oldsmobile was one of independent contractor, not employee-employer. *Parham, supra*. Accordingly, the trial court erred in denying defendant General Casualty Insurance Company's motion for summary disposition and granting defendant Westfield Insurance Company's motion for summary disposition.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

[1] Because this action involves the priority of insurance coverage under the no-fault act, we need not consider the definition of employee as found in a separate and distinct statute.