# STATE OF MICHIGAN

# COURT OF APPEALS

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| TIMOTHY S. HODNETT,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>April 21, 2015 |
| v | No. 320302<br>Eaton Circuit Court |
| ALRO STEEL CORPORATION,<br><br>Defendant-Appellee. | LC No. 12-001578-NO |

Before: BORRELLO, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in this negligence action where plaintiff is seeking relief outside the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. The trial court, applying the "economic reality test" held that plaintiff was barred from bringing this suit under the exclusive remedy provisions of the WDCA. MCL 418.131. For the reasons set forth in this opinion, we affirm.

## I. FACTUAL BACKGROUND

It is not disputed that plaintiff provided trucking services to defendant. From the record, we glean that plaintiff leased a semi-truck and trailer from Martens Transport and then sublet the truck and trailer to an entity titled Black Lake Ventures. Black Lake Ventures, through J & S Express, a transportation broker, then arranged for the truck and trailer, with plaintiff as its operator, to transport steel for defendant between defendant's facilities in Potterville, Michigan and Dayton, Ohio. Black Lake Ventures would bill defendant for the services and then distribute the proceeds as follows: 8% to J & S Express, 26% to plaintiff, 50% plus a fuel surcharge to Martens Transport, and it would retain the remaining 16% for itself. Black Lake Ventures did not deduct taxes before giving plaintiff his share of the earnings. Testimony established that defendant would occasionally tell Black Lake Ventures and Martens Transport that it did not want certain drivers and those requests were routinely honored.

While at defendant's facility, plaintiff was subject to defendant's direct control and was not allowed to go into the loading pit while his truck was being loaded. Pursuant to federal regulations, once the truck was loaded, plaintiff was required to strap the load down. Plaintiff was trained on how to strap his load down by Kevin Martens, owner of Martens Transport. On

one occasion, plaintiff was strapping his load down when a piece of steal from an adjacent truck fell and struck him causing injury. Plaintiff then filed suit in tort and defendant moved for summary disposition, arguing that plaintiff was its "employee" for purposes of the WDCA and, therefore, bound by the WDCA's exclusive remedy provision. MCL 418.131(1). The trial court applied the "economic reality test" and concluded that for purposes of the WDCA, plaintiff was defendant's employee and therefore subject to the exclusive remedy provision of the WDCA.

## II. STANDARD OF REVIEW

This Court "reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Questions of statutory interpretation are also reviewed de novo. *Bush v Shabahang*, 484 Mich 156, 164; 722 NW2d 272 (2009).

## III. ANALYSIS

The exclusive remedy provision of the WDCA states that "the right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." MCL 418.131(1). The provision also states:

> As used in this section and section 827, "employee" includes the person injured, his or her personal representatives, and any other person to whom a claim accrues by reason of the injury to, or death of, the employee, and "employer" includes the employer's insurer and a service agent to a self-insured employer insofar as they furnish, or fail to furnish, safety inspections or safety advisory services incident to providing worker's compensation insurance or incident to a self-insured employer's liability servicing contract. [MCL 418.131(2).]

"Employer" is defined as "[e]very person [or] firm . . . who has any person in service under any contract of hire." MCL 418.151. There is no dispute that defendant meets this definition.

MCL 418.161 provides several alternative definitions of the word "employee" and prefaces the list with the instruction that the list provides the definition of the word "[a]s used in this act." This directive is clear, and thus the definition section applies to the exclusive remedy provision. While fifteen different subsections/definitions exist, the most applicable one for purposes of the present case is subsection (1)(n). It states:

> 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).]

We next turn to whether application of the economic reality test provides the proper framework which this Court should employ to reach its decision. In *Hoste v Shanty Creek Mgt*, 459 Mich 561, 571-572; 592 NW2d 360 (1999), our Supreme Court stated that the Legislature's

amendments to section 161 superseded the economic reality test. Specifically, our Supreme Court stated that the common-law economic reality test "was appropriate until the Legislature, as it of course has the authority to do, chose to speak about who was an independent contractor." *Id.* at 572. The Court determined that the economic reality test could not be used to supersede the statute. *Id.* While this appears to instruct that the question of whether an employment relationship existed required looking at the statutory language in section 161 and not the economic reality test, the Supreme Court issued an opinion in *Clark v United Technologies Auto*, 459 Mich 681; 594 NW2d 447 (1999), less than a month later, and in that case the Court applied the economic reality test. However, the recent Supreme Court decision in *Auto Owners Ins Co v All Star Lawn Specialists Plus*, 497 Mich 13, 15, 18-19; 857 NW2d 520 (2014) focused on the definition of "employee" under § 161(1)(n) in a case where a worker was trying to sue in tort outside of the WDCA. The Supreme Court held that under that subsection, if a worker is "performing service in the course of the trade, business, profession or occupation of an employer at the time of an injury," that person is an employee so long as the worker does not either "maintain a separate business . . . hold himself or herself out to and render service to the public . . . and is not an employer subject to th[e] act." *Id.* at 19. The Supreme Court overruled this Court and held that if any of the three is found to exist, the worker is divested of employee status and is an independent contractor. *Id.* While this Court's interpretation of § 161(1)(n) was overturned by the Supreme Court, it is also worth noting that this Court also solely referenced § 161(1)(n) in its analysis and did not employ the economic reality test. *Auto-Owners Ins Co v All Star Lawn Specialists*, 303 Mich App 288, 294-301; 845 NW2d 744 (2013). Accordingly, we do not find the economic reality test applicable to this case. Additionally, we base our decision to reject the economic realty test, in part, because such an approach could result in a situation where the statutory analysis concludes that the worker is not an employee and therefore not entitled to WDCA benefits, but the economic reality test concludes the worker is an employee and therefore unable to proceed outside the WDCA. In such cases, an injured worker would have no remedy.

We therefore turn to the language in MCL 418.161(1)(n) to resolve the issue of whether plaintiff's suit is barred by MCL 418.131. Review of the statutory language and the record leads us to conclude that plaintiff was performing a service in the course of defendant's business. Therefore, according to *Auto Owners*, plaintiff is considered an employee of defendant so long as plaintiff does not maintain a separate business, hold himself out to and render service to the public, or is an employer subject to the WDCA. The record sufficiently establishes that plaintiff meets none of these exceptions. He does not own a separate business and he exclusively drove a truck pursuant to the arrangement with defendant, Black Lake Ventures, and Martens Transport. Accordingly, plaintiff is an "employee" under MCL 418.161(1)(n) and is therefore subject to the exclusive remedy provision in MCL 418.131.

Accordingly, though using a different analytical framework, the trial court did not err in granting summary disposition to defendant on the issue of whether plaintiff was bound by the exclusive remedy provision of the WDCA. Plaintiff was an "employee" of defendant for purposes of the WDCA, including the exclusive remedy provision, because plaintiff met the statutory definition of that term as it is defined in MCL 418.161(1)(n). Plaintiff is therefore entitled to whatever relief is available to him under the WDCA, but is barred by the exclusive remedy provisions found in MCL 418.131.

Affirmed. No costs are awarded. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause
/s/ Michael J. Riordan